Supreme Court, U.S.
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NO. 93-1734

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LONNIE K. STEPHENS,

Petitioner

versus

CHARLES B. MILLER, WARDEN, and ATTORNEY GENERAL OF THE STATE OF INDIANA,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether application of the Indiana Rape Shield Statute [I.C. 35-37-4-4] to bar a criminal defendant from testifying as to what occurred at the time and place of the alleged offense violates the defendant's right to testify under the Fourteenth, Fifth, and Sixth Amendments to the United States Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LONNIE K. STEPHENS, Petitioner
V.
CHARLES B. MILLER, Warden,
and ATTORNEY GENERAL OF THE
STATE OF INDIANA, Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Lonnie K. Stephens respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, en banc, (App., infra, 1a-52a) is reported at 13 F.3d 998.

The opinion of the United States Court of Appeals for the Seventh Circuit

(App., infra, 53a-63a) is reported at 989 F.2d 264.

The opinion of the United States District Court for the Northern District of Indiana (App., infra, 64a-89a) is reported at 756 F.Supp. 1137 (N.D.Ind. 1991).

The opinion of the Indiana Supreme Court (App., infra, 90a-107a) is reported at 544 N.E.2d 137 (Ind. 1989).

JURISDICTION

The Petitioner filed his petition for writ of habeas corpus in district court pursuant to 28 U.S.C. § 254. The petition was denied. The Petitioner appealed to the court of appeals which affirmed the district court on January 6, 1994. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a criminal defendant's constitutional right to present evidence in his own defense pursuant to the Fourteenth, Fifth, and Sixth Amendments to the United States Constitution and the trial court's exclusion of such evidence based upon its application of the Indiana Rape Shield Statute, I.C. 35-37-4-4.

These constitutional and statutory provisions are as follows:

United States Constitution 14th Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.

United States Constitution 5th Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution 6th Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted

with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

I.C. 35-37-4-4 (Indiana Rape Shield Statute) in pertinent part:

(a) In a prosecution for a sex crime as defined in I.C. 35-42-4:

(1) Evidence of the victim's past sexual conduct;

(2) Evidence of the past sexual conduct of a witness other than the accused;

(3) Opinion evidence of the victim's past sexual conduct;

(4) Opinion evidence of the past sexual conduct of a witness other than the accused;

(5) Reputation evidence of the victim's past sexual conduct; and

(6) Reputation evidence of the past sexual conduct of a witness other than the accused; may not be admitted, nor may reference be made to this evidence in the presence of the jury, except as provided in this chapter.

(b) Notwithstanding subsection (a) evidence:

(1) Of the victim's or a witness' past sexual conduct with the defendant;

(2) which is a specific instance of sexual activity shows that some person other than the defendant committed the act upon which the prosecution is founded; or

(3) That the victim's pregnancy at the time of the trial was not caused by the defendant;

may be introduced if the judge finds, under the procedure provided in subsection (c) of this section, that it is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

STATEMENT

The Petitioner, Lonnie K. Stephens, ("Stephens"), was convicted of attempted rape after a jury trial in an Indiana court. In that trial Stephens was prevented from testifying as to certain statements he made to the alleged victim at the time and place of the alleged offense. The state trial court excluded such testimony based upon its

application of the Indiana Rape Shield Statute, I.C. 35-37-4-4. Stephens appealed his conviction to the Indiana Supreme Court which affirmed the conviction three (3) to two (2).

Stephens' petition for writ of habeas corpus was denied by the United States District Court. This decision was appealed to the court of appeals which issued a unanimous opinion reversing the district court. The State of Indiana petitioned for rehearing en banc, which petition was granted. The Seventh Circuit, en banc, affirmed the district court with a four (4) judge plurality opinion. Two (2) judges filed separate concurring opinions. Five (5) judges dissented through four (4) opinions.

As stated by the district court (App., infra, p. 65a-66a):

> Both the prosecutrix and the defendant tell vastly different versions of what took place that evening. There was no physical evidence nor were there witnesses. Petitioner asserts that the crucial factor in his appeal is that he was prevented from relating his entire version of the events of the evening.

TESTIMONY OF PROSECUTRIX

At the trial, the prosecutrix was allowed to relate to the jury her full story of what occurred at the time and place of the alleged offense. According to the prosecutrix, she was asleep on the couch of her house trailer. Her sister and brother-in-law were asleep in one bedroom and her son and nephew were asleep in another bedroom. She awoke to find the defendant standing in front of her inside the house trail-

er. The defendant sat down beside her on the couch and made verbal and physical sexual advances. She yelled for her sister twice with no response. The defendant indicated that he needed to use the bathroom. The defendant went down the hallway toward the bathroom. The prosecutrix waited for him in the living room in order to show him the door when he returned. The defendant returned and accused the prosecutrix of lying about the presence of other people in the trailer. He threw her down on the couch, covered her mouth with his hand, pressed his body against hers, tore a button on her shirt, and undid her bra. When the defendant attempted to undo his pants, the prosecutrix flipped him off of her and ran to the bedroom shouting for

her sister and brother-in-law. She succeeded in awakening them and she talked to them for awhile until she calmed down. When her sister and brother-in-law went back to bed, the prosecutrix laid down again on the couch without locking the door through which the defendant had entered the trailer. Some time later, the prosecutrix received a telephone call from her estranged husband. She told her husband that the defendant had tried to rape her. Her husband came to the trailer in an agitated state about three (3) hours after the defendant had left. He entered the trailer through the still unlocked door; and, in talking to the prosecutrix, he made enough noise to awaken her sister and brother-in-law. An argument ensued between the

husband and the brother-in-law so the sister of the prosecutrix called the police. When the police responded to the call, neither the prosecutrix, her husband, her sister nor her brother-in-law told the police of the alleged attempted rape. The next day the trailer park landlady confronted the prosecutrix about the noise in the trailer and about the police being called. The landlady indicated that such incidents would not be tolerated. While the noise and police involvement was from the altercation between her husband and brother-in-law, the prosecutrix told the landlady that the police had been called because she had an uninvited intruder into her house trailer. The landlady advised the prosecutrix to contact the police to obtain a

restraining order. The prosecutrix then reported to the police that the defendant had attempted to rape her.

TESTIMONY OF THE DEFENDANT

The defendant testified that he went to the trailer of the prosecutrix pursuant to a standing invitation to visit sometime. She was awake and invited him into the trailer where her child was asleep in the living room. At her suggestion, the defendant carried the child into a bedroom and returned to sit with her on the couch. After some conversation, the defendant asked the prosecutrix if he could kiss her. They proceeded to kiss and the defendant unhooked her bra and fondled her breast without objection. At the suggestion of the prosecutrix, they moved a coffee table and chair so that they could

lie down on the floor. While engaged in consensual sexual intercourse, the defendant said something that caused her to become so angry that she ordered him to stop and told him to leave. As he left, the defendant heard the prosecutrix call for her sister.

The trial court would not allow the defendant to testify as to what he had said to cause the prosecutrix to become so angry. The defendant wanted to tell the jury that he told the prosecutrix that another couple had told him that they had been involved in a partner switching arrangement in which the prosecutrix had participated and that she liked to engage in sexual intercourse "doggy fashion". The defendant was not allowed to testify that this was

the remark which had caused the prosecutrix to become angry.

REASONS FOR GRANTING THE PETITION

Congress and forty-eight (48) states have enacted a rape shield law. Consequently, it can be expected that there will be many occasions when the application of such statutes will conflict with the criminal defendant's constitutional right to present evidence in his own defense, as occurred in this case. While there is United States Supreme Court precedent for applying a "balancing test" in order to resolve such a conflict, "the [United States Supreme] Court has yet to formulate a clear standard for determining when a governmental interest is sufficiently important to outweigh the accused's interest in presenting relevant

testimony." (App., infra, 11a), (Flaum, J., concurring). This case provides the Court with an exceptional opportunity to provide such guidance to the lower federal courts and to state courts throughout the country which will face this dilemma in the future. Moreover, the decision below is erroneous and the issue presented of extreme importance.

A. STANDARD FOR DETERMINING WHEN A CRIMINAL DEFENDANT MAY BE DENIED THE RIGHT TO PRESENT RELEVANT EVIDENCE.

Nothing is clearer testament to the presently confused state of the law than the fact that the eleven (11) judges of the Seventh Circuit issued seven (7) opinions with four (4) judges in the plurality, two (2) concurring opinions, and five (5) judges issuing four (4) dissenting

opinions. Guidance from the United States Supreme Court is clearly indicated.

The confusion which exists is manifested in what may well be the most fundamental of all issues -- in whose favor is any doubt resolved. In his concurring opinion, Judge Flaum read Michigan v. Lucas, 111 S.Ct. 1743 (1991) and Maryland v. Craig, 497 U.S. 836 as demonstrating an " . . . incline toward a contraction of the unfettered right to present evidence and the closely related right of confrontation." (App., infra, 12a.) By contrast, Judge Ripple in dissent found that " . . . the cases have demonstrated a consistent mistrust of such restrictions." (App., infra, 44a.)

Another source of confusion is the impact that the court's assessment of the credibility of the evidence has on its admissibility. As Judge Ripple stated in dissent: "Indeed, the majority makes it clear that it disbelieves the defendant's story." (App., infra, 52a, fn 3.) In fact, the Second Circuit, as well as others, has excluded evidence based upon the lack of credibility of the declarant. Grochulski v. Henderson, 637 F.2d 50 (2d Cir. 1980), cert. denied, 450 U.S. 927 (1981). However, other courts, including the First Circuit, have held that the accused has the right to introduce "possibly unreliable evidence." Pettijohn v. Hall, 599 F.2d 476, 480 (1st Cir.), cert. denied, 444 U.S. 946 (1979).

This case would represent an excellent opportunity for the Supreme Court to set forth what if any impact a court's assessment of the credibility of the evidence may have on admissibility.

Another area of confusion is what standard to apply for how the importance of the evidence to the defense of the accused impacts on its admissibility. The plurality opinion does not discuss the standard which it is applying (a fact which is true on other issues raised by the opinion as well). The only indication given is that the defendant "was allowed to give his entire version of the facts, except for the excluded evidence." (App., infra, 7a.) That statement is obvious but unhelpful. Judge Flaum in his concurring opinion indicates

that "critical" evidence may not be excluded and cites the Supreme Court as stating that "evidence is 'critical' if it is 'relevant and material, and . . . vital to the defense' to a degree sufficient to establish that the exclusion of the evidence could have 'affected the outcome of the trial." 458 U.S. 858, 867-868 (1982) (citations omitted) (emphasis in original. . . ." (App., infra, 14a.) Judge Ripple, in dissent, (App., infra, p. 44a) describes the importance of the evidence factor to be part of the balance test:

> The more critical the excluded evidence to the defense of the accused, the more important must be the asserted state interest.

To determine how critical nature of the testimony, Judge Ripple would look at "the centrality of the

proffered testimony." (App., infra, 45a.) Certainly, that is an appropriate inquiry. Unfortunately, it was not used in the plurality opinion. In this case, the excluded evidence was central to the defense as the explanation of why the prosecutrix became enraged, withdrew her consent to intercourse, and threw the defendant out of the trailer. Judge Cummings, in dissent, (App., infra, p. 25a) stated that " . . . the majority has failed to explore the exculpatory significance of the excluded evidence. . . ." Judge Ripple states that " . . . the majority carefully steers clear of assessing just how central this testimony was to the defendant's defense." (App., infra, 51a.)

There is wide disagreement amongst the Judges of the Seventh Circuit as well as conflict amongst the various Circuit Courts of Appeal. Moreover, one of the Judges of the Seventh Circuit who voted to deny the habeas appeal explicitly complains of what he describes as "the absence of a well-defined standard." (App., infra, p. 12a.) This is the case in which to provide the direction sought by the lower courts.

B. DECISION OF THE SEVENTH CIRCUIT IS ERRONEOUS

The Supreme Court should also grant certiorari because the opinion of the Seventh Circuit, en banc, is erroneous. Obviously, the issue presented is important to this defendant because he is serving a twenty (20) year prison sentence

without being allowed to present fully his version of the events. However, the issue will be important as well to future criminal defendants who may be in similar circumstances. If allowed to stand, the Seventh Circuit decision will provide a precedent for state and federal courts in that circuit and authority for courts in other circuits to deny the defendant the right to testify as to what occurred at the time and place of an alleged criminal offense.

As Justice O'Connor has written:

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, Chambers v. Mississippi . . ., or in the Compulsory Process Clause or Confrontation Clauses of the Sixth Amendment, Washington v. Texas . . .; Davis v. Alaska . . ., the constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."

Crane v. Kentucky, 476 U.S. 683, 690 (1986). This defendant was denied such a meaningful opportunity.

The plurality opinion of the Seventh Circuit, en banc, (App., infra, 1a-9a) misses the point with respect to the question of whether this was even a proper application of the Indiana Rape Shield Statute. While the Court on habeas appeal would properly be addressing constitutional issues and not statutory interpretation, a determination of whether the statute properly applies is important in assessing the interests of the State in excluding the evidence. The plurality opinion states that the noble purposes of the rape shield statute outweigh the defendant's constitutional right to present evidence; however, the

interests of the State are not the same if the law has been misapplied. As Judge Cudahy (App., infra, 28a) appropriately states:

> . . . [B]ecause the scope of a defendant's constitutional right to testify on his own behalf requires a weighing of the relevant interests, it is important to recognize that the state's interest here is not, as the majority would have it, the very interest that undergirds all rape shield legislation. Maj. Op. at 8.

The plurality (App., infra, 7a) maintains that the defendant's constitutional rights were not violated because:

> The Indiana trial court properly balanced Stephens' right to testify with Indiana's interests because it allowed him to testify about what happened and that he said something that upset Wilburn. The Constitution requires no more than this. The interests served by the Indiana Rape Shield Statute justify this very minor imposition on Stephens' right to testify.

Surely the Constitution requires more than this. This would be the equivalent of the Court in Crane, supra, stating that the defendant should be allowed to testify that there was a physical and psychological environment which effected his confession without being allowed to describe what that physical and psychological environment was. Obviously, it would be impossible for the trier of fact to be able to determine whether the assertion that the environment effected his confession is credible unless a description of that environment is also allowed. Similarly, allowing the defendant in this case to merely state that he said something which caused the prosecutrix to become angry and withdraw her consent does not provide the jury with a

meaningful context to his version of the events in order for the jury to make an appropriate assessment of the defendant's credibility. As Judge Ripple (App., infra, 50a-51a) noted:

> To limit the defendant to testifying that he said "something" that angered her is to deprive the jury of the essence of his testimony. It was the rawness of what he allegedly said that would have given substance to his testimony. Only after being apprised of that statement and ascertaining whether such an utterance, made when it was made, would produce the reaction that it did in this particularly complainant could the jury have determined whether the statement was made and, if made, whether it produced the alleged reaction.

Moreover, as Judge Ripple also noted, the Court-imposed vagueness of the testimony would certainly undermine the credibility of the defendant's entire testimony. (App., infra, 51a-52a.)

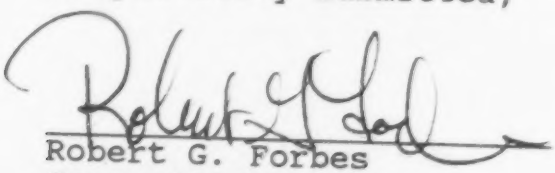
Finally, Judge Rovner's concurring opinion (App., infra, 17a-22a) would appear to stand for the proposition that evidence which would be admissible if offered for the purpose of showing bias or motive to fabricate on the part of a witness but not if it is 'merely' to explain what occurred at the time and place of an alleged offense. Such an analysis should be squarely rejected. In this case, the excluded testimony would tend to show a motive to fabricate on the part of the prosecutrix although the trouble with her landlady was clearly the precipitating factor which caused her to make the initial complaint. However, to say that should not minimize the fact that the excluded testimony was essential to show a complete version of what

actually happened on the night in question. It would indeed be a curious state of affairs for a defendant to have the constitutional right to show motive to fabricate but not have such a constitutional right to present his version of the incident in question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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In the

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For the Seventh Circuit

No. 91-1690

LONNIE K. STEPHENS,

Petitioner-Appellant,

v.

CHARLES B. MILLER, WARDEN, and
ATTORNEY GENERAL OF THE STATE
OF INDIANA,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, Fort Wayne Division.
No. 90 C 68—**William C. Lee**, *Judge.*

ARGUED SEPTEMBER 19, 1992—DECIDED MARCH 26, 1993
REARGUED *En Banc* SEPTEMBER 8, 1993—
DECIDED JANUARY 6, 1994

Before POSNER, *Chief Judge*, CUMMINGS, BAUER, CUDAHY, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, and ROVNER, *Circuit Judges.*

BAUER, *Circuit Judge.* This case requires us to decide whether Lonnie K. Stephens was deprived of his constitutional right to testify when an Indiana court applied Indiana's Rape Shield Statute to exclude at trial certain statements that Stephens claims he made during the events that led to his conviction. Stephens was convicted of attempted rape and the Indiana Supreme Court affirmed his

conviction. *Stephens v. State*, 544 N.E.2d 137 (Ind. 1989). Stephens filed a petition for writ of habeas corpus in the federal district court pursuant to 28 U.S.C. § 2254. The district court denied his petition. *Stephens v. Morris*, 756 F. Supp. 1137 (N.D. Ind. 1991). Stephens appeals.

I.

On the night of March 17, 1987, Lonnie Stephens went to Melissa Wilburn's trailer. At trial, Stephens and Wilburn told vastly different stories about what happened after Stephens arrived. The events of that evening began after Stephens and David Stone finished drinking. Stone drove Stephens to Wilburn's trailer and dropped him off. Stephens and Wilburn knew each other as casual acquaintances. Wilburn was asleep on the couch when Stephens arrived, and her sister and brother-in-law were asleep in the guest room. Wilburn's son and nephew were asleep in another bedroom.

According to Wilburn, she did not lock the door before she fell asleep. She awoke and found Stephens standing in front of the door inside the trailer. Stephens sat down next to Wilburn and attempted to kiss her. Wilburn told Stephens of the others who were asleep in the trailer and called out for her sister. Stephens hesitated but, after a moment, continued his advances. Wilburn yelled one more time for her sister, but her sister again did not respond. Stephens went to the bathroom and, when he returned, angrily told Wilburn that she lied to him about the others being in the trailer. He threw her down on the couch and covered her mouth with his hand to prevent her from screaming. Stephens pressed his body against Wilburn's, undid her bra, and tore a button from her shirt. Next, Stephens reached down to undo his pants. Wilburn pushed Stephens off of her and ran screaming into the bedroom occupied by her sister and brother-in-law.

Stephens ran out the door to the nearby home of his friends, Jeff and Lisa Strait. Stephens told the Straits that he had been at a local Pic a Pac Store. Later, Stephens

told that same story to the police officer who investigated the incident. Stephens directed Stone to say, if he were asked, that Stone dropped him off at the Pic a Pac. At trial, Stone first repeated the Pic a Pac story, then admitted on cross-examination that he dropped Stephens off at Wilburn's trailer. Stone also admitted that he told the Pic a Pac story pursuant to directions from Stephens.

Stephens testified at trial and painted a quite different picture of the evening's events. He claimed that Wilburn invited him into her trailer after Stone dropped him off. Stephens stated that when he entered the trailer, Wilburn's son was asleep on the couch. Stephens carried him to one of the bedrooms and Wilburn explained that her sister, brother-in-law, and their child were also asleep in the bedroom. All three slept through Stephens' visit to the trailer. Stephens and Wilburn talked in the living room, and Wilburn told Stephens he could kiss her. One thing led to another, according to Stephens, until the two of them ended up on the floor as two consenting adults engaged in sexual intercourse.

Stephens stated in an offer of proof that the two of them were "doing it doggy fashion" when he said to her "[d]on't you like it like this? . . . Tim Hall said you did." Tr. 1278. Stephens also asserted that he said something to Wilburn about "switching partners." Tr. 1276. The trial court excluded these statements pursuant to the Indiana Rape Shield Statute. Ind. Code § 35-37-4-4.[1] The court did,

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[1] The Indiana Rape Shield Statute provides, in pertinent part:

(a) In a prosecution for a sex crime as defined in IC 35-42-4:

(1) evidence of the victim's past sexual conduct;

(2) evidence of the past sexual conduct of a witness other than the accused;

(3) opinion evidence of the victim's past sexual conduct;

(4) opinion evidence of the past sexual conduct of a witness other than the accused;

(Footnote continued on following page)

however, allow Stephens to testify that he said something to Wilburn that angered her and led her to fabricate the attempted rape charge. Stephens testified that after he made these statements, Wilburn ordered him to stop and leave. Stephens claimed that he did as she asked, got dressed, and left.

The jury returned a guilty verdict against Stephens on the attempted rape charge. The Indiana Supreme Court affirmed his conviction and the district court denied his petition for writ of habeas corpus.

II.

Stephens contends that the Indiana trial court erred when it excluded the proffered testimony. First, he argues that the court misapplied the Indiana Rape Shield Statute. Second, Stephens claims that the court's application of the Indiana Rape Shield Statute violated his constitutional

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[1] *continued*

(5) reputation evidence of the victim's past sexual conduct; and

(6) reputation evidence of the past sexual conduct of a witness other than the accused;

may not be admitted, nor may reference be made to this evidence in the presence of the jury, except as provided in this chapter.

(b) Notwithstanding subsection (a), evidence:

(1) of the victim's or a witness's past sexual conduct with the defendant;

(2) which in a specific instance of sexual activity shows that some person other than the defendant committed the act upon which the prosecution is founded; or

(3) that the victim's pregnancy at the time of trial was not caused by the defendant;

may be introduced if the judge finds, under the procedure provided in subsection (c) of this section, that it is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Ind. Code §§ 35-37-4-4(a) and (b).

right to testify in his own defense. Finally, Stephens argues that the excluded testimony should be admissible as the *res gestae* of the attempted rape.

A. *Application of the Indiana Rape Shield Statute under Indiana Law*

Stephens' first contention need not detain us long. He argues that we should grant his petition because the Indiana trial court and the Indiana Supreme Court misapplied the Indiana Rape Shield Statute under Indiana law. That may be, but whether the Indiana courts correctly applied their own law is, by itself, no concern of ours. Federal habeas actions do not lie for mere errors of state laws. *Estelle v. McGuire*, 112 S. Ct. 475, 480 (1991); *Reed v. Clark*, 984 F.2d 209, 210 (7th Cir. 1993). We ask only whether Indiana denied Stephens his rights under the Constitution, laws, or treaties of the United States. *Estelle*, 112 S. Ct. at 480; *Reed*, 984 F.2d at 210. We therefore will not consider the merits of his claim that the Indiana courts misapplied their own law.

B. *Constitutionality of the Indiana Rape Shield Statute as Applied Here*

Stephens does not challenge the facial constitutionality of the Indiana Rape Shield Statute, and for good reason. In *Moore v. Duckworth*, 687 F.2d 1063 (7th Cir. 1983), we upheld the facial validity of the Indiana Rape Shield Statute. Still, although the principle of rape shield statutes has been held constitutional, both by this court and the Supreme Court in *Michigan v. Lucas*, 111 S. Ct. 1743 (1991), the constitutionality of the law as applied remains subject to examination on a case by case basis. *Sandoval v. Acevedo*, 996 F.2d 145, 149 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 307 (1993). Stephens claims that Indiana unconstitutionally applied its Rape Shield Statute in this case. His primary argument is that Indiana denied him his constitutional right to testify in his own defense when it did

not allow him to tell his version of the events, in their entirety and in his own words, about what happened on March 17, 1987 at Melissa Wilburn's trailer. Stephens argues that the Indiana court violated the federal constitution when it excluded his statements about "doggy fashion" sexual intercourse and partner switching.

The Supreme Court has interpreted the Constitution to provide a criminal defendant, like Stephens, with an implicit right to testify in his or her own defense. *United States v. Dunnigan*, 113 S. Ct. 1111, 1117 (1993); *Rock v. Arkansas*, 483 U.S. 44 (1987). For purposes of state criminal proceedings, like this one, the right to testify arises out of the Fourteenth Amendment's Due Process Clause, which provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law," U.S. const. amend. XIV. The right to testify is also found in the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. It is also a "necessary corollary" of the constitutional guarantee against compelled testimony. *Rock*, 483 U.S. at 52. This "necessary corollary" is derived from the Fifth Amendment's mandate that "[n]o person . . . shall compelled in any criminal case to be a witness against himself." U.S. amend. V.

A criminal defendant's right to testify, however, is not unlimited and may bow to accommodate other legitimate interests in the criminal trial process. *Lucas*, 111 S. Ct. at 1746; *Rock*, 483 U.S. at 55. There is, for example, no constitutional right to commit perjury. *Dunnigan*, 113 S. Ct. at 1117. Furthermore, numerous procedural and state evidentiary rules control the presentation of evidence and do not offend a criminal defendant's right to testify. *Rock*, 483 U.S. at 55 n.11; *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

Rape shield statutes fall into the category of procedural and evidentiary rules referred to in *Rock* and *Chambers*.

Rape shield statutes, like Indiana's, represent the valid legislative determination that victims of rape and, as here, attempted rape deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy. *Lucas*, 111 S. Ct. at 1743, 1746. These statutes also protect against surprise to the prosecution. *Id.* Restrictions imposed by rape shield statutes, especially as they relate to a criminal defendant's right to testify, may not, however, be arbitrary or disproportionate to the purposes they are designed to serve. *Id.*; *Rock*, 483 U.S. at 56. Rather, the state is required to evaluate whether the interests served by the rule justify the limitation imposed on the criminal defendant's right to testify. *Id.*

In this case, Stephens was allowed to give his entire version of the facts, except for the excluded evidence. The Indiana court allowed Stephens to testify in front of the jury that he said something to Wilburn that angered her and caused her to fabricate the attempted rape charge. The court did nothing arbitrary or disproportionate to the purposes the Indiana Rape Shield Statute was designed to serve when it excluded the "doggy fashion" and "partner switching" statements. The Indiana Rape Shield Statute was enacted to prevent just this kind of generalized inquiry into the reputation or past sexual conduct of the victim in order to avoid embarrassing her and subjecting her to possible public denigration. *Tague v. Richards*, 3 F.3d 1133, 1139 (7th Cir. 1993) (citing *Kelly v. State*, 586 N.E.2d 927, 929 (Ind. App. 1992) and *Thomas v. State*, 471 N.E.2d 681, 683 (Ind. 1984)). Its application to exclude references here to "doggy fashion" sexual intercourse and partner switching effectuate its purpose. The Indiana trial court properly balanced Stephens' right to testify with Indiana's interests because it allowed him to testify about what happened and that he said something that upset Wilburn. The Constitution requires no more than this. The interests served by the Indiana Rape Shield Statute justify this very minor imposition on Stephens' right to testify.

We note also that Stephens and Wilburn told drastically different stories of what happened and that Stephens directed David Stone to commit perjury. The jury was entitled to credit Wilburn's story, discount Stephens' account, and return a guilty verdict. Testimony about Wilburn's alleged sexual preferences would have served no other purpose than to embarrass and humiliate her. Accordingly, the Indiana trial court properly balanced the state's interests with Stephens' right to testify when it excluded the testimony at issue here.

Stephens was not deprived of his constitutional right to testify.

C. Res Gestae

Stephens raises one other argument: that the excluded testimony was evidence concerning the *res gestae* of the offense and therefore should have been admitted. Literally "the thing done," the *res gestae* of a particular offense under Indiana law is admissible and is defined as evidence of happenings near in time and place which complete the story of a crime. *Atkinson v. State*, 581 N.E.2d 1247, 1249 (Ind. 1991); *Beatty v. State*, 567 N.E.2d 1134, 1136 (Ind. 1991). There are two problems with Stephens' *res gestae* argument.

First, we do not accept Stephens' *res gestae* argument because to do so would effectively gut rape shield statutes and violate the principle established in *Lucas*. If Stephens' *res gestae* argument were correct, as a matter of constitutional law, criminal defendants could always circumvent rape shield statutes by claiming that they said something near in time and place to the alleged rape or attempted rape about the victim's past sexual history or reputation.

Second, Stephens offers nothing, probably because nothing exists, to support his *res gestae* argument as a constitutional violation. In fact, the use of the term *res gestae*, for purposes of federal law, is essentially obsolete. The Federal Rules of Evidence, adopted in 1976, govern evi-

dentiary questions in federal court, and, more significantly given the issue here, no court has ever held that *res gestae* is a concept with any constitutional significance. Other federal courts have described the phrase *res gestae* as useless, harmful, and almost inescapable of a definition. *Williams v. Melton*, 733 F.2d 1492, 1494 (11th Cir.), *cert. denied*, 469 U.S. 1073 (1984); *Wheeler v. United States*, 211 F.2d 19, 23 n.11 (D.C. Cir. 1953) (quoting 6 Wigmore § 1767), *cert. denied*, 347 U.S. 1019 (1954). *See also State v. Hafford*, 410 A.2d 219, 220-21 (Me. 1980) (continued use of the term *res gestae* inappropriate under Maine law). Simply put, as a federal matter, "[t]he old catchall, '*res gestae*,' is no longer part of the law of evidence." *Miller v. Keating*, 754 F.2d 507, 509 (3d Cir. 1985).

We observe only that for purposes of the Constitution and federal law, the term *res gestae* is without significance. Indiana and the other states are, of course, free to keep the *res gestae* concept as part of their law of evidence. But here, as we have said, we ask only whether the Indiana court denied Stephens any right guaranteed to him by the Constitution. It did not.

III.

Nothing in the Constitution prohibited the exclusion of the testimony at issue in this case. The district court's decision to deny Stephens' petition for writ of habeas corpus is therefore

AFFIRMED.

FLAUM, *Circuit Judge*, concurring. This case forces us to confront the extreme tension if not the outright conflict between a criminal defendant's constitutional right to present evidence in his own defense[1] and a state's "sovereign prerogative" to regulate the presentation of evidence in its courts. *See Cunningham v. Peters*, 941 F.2d 535, 538 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1484 (1992) (quoting *Johnson v. Chrans*, 844 F.2d 482, 484 (7th Cir.), *cert. denied*, 488 U.S. 835 (1988)). Though the right to present relevant testimony in one's own behalf is of constitutional dimension, it is not without limitation[2] and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Rock*, 483 U.S. at 55 (1987) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)). The difficult question that we must resolve today is whether the Indiana rape shield statute curbs Stephens' ability to present arguably relevant evidence.

The Indiana rape shield statute undoubtedly advances important state interests, including (1) the protection of rape victims from public embarrassment and humiliation through exposure of their past sexual conduct, (2) the focusing of the fact-finder's attention on the defendant's alleged actions and away from marginally relevant collateral issues, and (3) the encouragement of rape reporting by victims. Further, this court has upheld the facial validity of the Indiana rape shield statute, *see Moore v. Duckworth*, 687 F.2d 1063 (7th Cir. 1983), and although the Su-

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[1] In *Rock v. Arkansas*, the Supreme Court explained that "[t]he right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution." 483 U.S. 44, 51 (1987). The right to testify is a "necessary ingredient" of the Due Process Clause of the Fourteenth Amendment, a "necessary corollary" to the Fifth Amendment's guarantee against compelled testimony, and also is found in the Compulsory Process Clause of the Sixth Amendment. *Id.* at 51-53.

[2] *But see infra* note 3 and accompanying text discussing the dissenting opinion of Justice Scalia, joined by Justices Brennan, Marshall, and Stevens, in *Maryland v. Craig*, 497 U.S. 836, 860 (1990).

preme Court has not yet confronted this question squarely, the Court has issued strong dicta indicating that rape shield statutes probably would survive facial challenges. *See Michigan v. Lucas*, 111 S.Ct. 1743, 1746 (1991) (holding that preclusion of evidence of defendant's own past sexual conduct with the victim, because of defendant's failure to comply with notice-and-hearing requirements of Michigan's rape shield statute, was not a *per se* violation of the Sixth Amendment). In *Lucas*, the Court noted that Michigan's rape shield statute "represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." *Id.* at 1746 (majority opinion); *see also id.* at 1749 (Blackmun, J., concurring).

While I believe that the relevant Supreme Court and Seventh Circuit precedents indicate that the typical rape shield statute should survive facial attack, in this case we must consider whether it is constitutionally permissible to apply the Indiana rape shield statute to preclude a defendant from giving a full exposition of his version of the events surrounding the crime of which he was accused. *See, e.g., Tague v. Richards*, 3 F.3d 1133, 1137 (7th Cir. 1993); *Sandoval v. Acevedo*, 996 F.2d 145, 149 (7th Cir.), *cert. denied*, 114 S.Ct. 307 (1993). On several occasions, the Court has endorsed a balancing test for resolving conflicts between the government's interest in maintaining its evidentiary rules and the accused's interest in presenting relevant evidence in his defense. *See, e.g., Rock*, 483 U.S. at 55; *Davis v. Alaska*, 415 U.S. 308, 319 (1974); *Chambers*, 410 U.S. at 295; *Johnson*, 844 F.2d at 484. As Judge Cudahy points out, "our efforts at striking this balance should be sensitive to the guidance that Supreme Court precedent provides." *Post*, at 29 (Cudahy, J., dissenting). Unfortunately, when one examines the relevant Supreme Court authority mandating a balancing test, one must conclude that the Court has yet to formulate a clear standard for determining when a governmental interest is sufficiently important to outweigh the accused's interest in presenting relevant testimony. *See* Joan L. Larsen,

Comment "Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)," 87 *Nw.U.L.Rev.* 651, 675-676 (1993). Hence, we must infer an approach that appropriately balances the competing interests at stake in this case.

Recognizing the absence of a well-defined standard, I believe that the Court's recent cases involving rape shield statutes and analogous areas of Sixth Amendment jurisprudence incline toward a contraction of the unfettered right to present evidence and the closely related right of confrontation. In *Lucas*, the Court noted that the operation of a procedural provision of Michigan's rape shield statute to exclude the presentation of relevant evidence is not necessarily unconstitutional even though it in effect diminishes the defendant's ability to confront adverse witnesses and present a defense. *See* 111 S.Ct. at 1746. While the Court long has recognized that Sixth Amendment rights "must be interpreted in the context of the necessities of trial and the adversary process," *Maryland v. Craig*, 497 U.S. 836, 850 (1990) (listing cases in which states' interests in orderly trial procedures did not violate defendants' Sixth Amendment rights), the Court only recently has relied on articulated state interests *external* to the trial process to uphold a limitation on the scope of a defendant's presentation of evidence at trial. In *Craig*, a sharply divided Court held that the Confrontation Clause of the Sixth Amendment did not categorically prohibit a child witness in a child abuse case from testifying outside the defendant's physical presence by one-way closed circuit television.[3] *Id.* at 853. *Craig* directs us to continue ap-

[3] Justice Scalia, joined by Justices Brennan, Marshall, and Stevens, wrote a strong dissent in *Craig* that began as follows:

> Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion. The Sixth Amendment provides, with unmistakable clarity, that "[i]n all criminal prosecutions, the

(Footnote continued on following page)

plying a case-specific balancing test, and it indicates that policy interests external to the trial process, such as those embodied by rape shield statutes, may outweigh, in some select and limited cases, a defendant's completely unfettered Sixth Amendment rights.[4]

Whether a state interest can justify a limitation upon a defendant's right to present relevant evidence depends upon the relative weights of the interest and the evidence. A state may not "mechanistically" apply its evidentiary rules to deprive the defendant of a fair trial, and "critical" evidence may not be excluded. *Chambers*, 410 U.S. at 302. As the Court stated in *United States v. Valenzuela-Bernal*,

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[3] *continued*

> accused shall enjoy the right . . . to be confronted with the witnesses against him." The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court.

497 U.S. at 860-861 (Scalia, J., dissenting). Justice Scalia's textual approach has considerable force and obviously would eliminate the difficulty of applying the murky balancing test we now must employ to resolve conflicts between a defendant's rights to testify and to cross-examine witnesses and the various state statutes that restrict these rights. But ours is a hierarchical judiciary, and Justice Scalia's view, whatever its appeal, has not prevailed. Thus, until we receive further guidance from the Court, we must endeavor to define and apply a standard that balances the competing interests.

[4] In *Davis v. Alaska*, 415 U.S. 308 (1974), the Court balanced a criminal defendant's right to cross-examine adverse witnesses against a state interest external to the trial process—namely, preserving the anonymity of juvenile offenders. The *Davis* Court resolved the balancing of interests in favor of the defendant's right to cross-examine. The case at bar is similar to both *Davis* and *Craig* in that the statutes in all three cases sought to shelter persons whom the legislature deemed particularly vulnerable (rape victims, juvenile offenders, and child abuse victims) from further trauma and embarrassment. However, this case and *Craig* present an additional important state interest—the reporting and prosecution of sex offenses—not found in *Davis*.

evidence is "critical" if it is "*relevant* and *material*, and . . . *vital* to the defense" to a degree sufficient to establish that the exclusion of the evidence could have "affected the outcome of the trial." 458 U.S. 858, 867-868 (1982) (citations omitted) (emphasis in original); *see also Sharlow v. Israel*, 767 F.2d 373, 377-378 (7th Cir. 1985), *cert. denied*, 475 U.S. 1022 (1986) (holding that state evidentiary rule (hearsay) was not "mechanistically" applied because the testimony excluded was not "critical" to the defense). More recently, the Court has indicated that state restrictions on an accused's right to present a defense "may not be arbitrary or disproportionate to the purposes they are designed to serve." *Lucas*, 111 S.Ct. at 1747 (citing *Rock*, 483 U.S. at 56). In my judgment the application of the rape shield statute in this case neither likely affected the outcome of the trial nor could fairly be labelled arbitrary or disproportionate to the purposes of the statute in light of the High Court's recent decisions.

There can be no real question that Stephens' proposed testimony about the reputation and past sexual practices of the victim is of the kind that rape shield statutes are designed to exclude. Neither can there be any doubt that the proposed testimony in this case was linked to Stephens' effort to challenge the complainant's credibility, an inquiry to which he was constitutionally entitled. But while the opportunity for such an attack may not be denied him *in toto*, it is clear to me that after *Craig* and *Lucas* the State may in limited circumstances regulate the breadth of the assault. From this I must conclude that rape shield laws in particular now carry an implied judicial imprimatur of approval and undoubtedly represent a pivotal legislatively-driven circumscription of a criminal defendant's right to muster relevant evidence for his cause.

Nonetheless, if constitutional jurisprudence has crossed this legal rubicon, it must settle at a principled resting place. That is, once it is acknowledged that a defendant's right to tell his story is not boundless, one is compelled to seek the broad and elemental contours of this right

that *are* inviolate. As an initial matter, it is apparent that a defendant cannot be denied the opportunity to elicit the core of operative facts that comprise his theory of defense. In a rape case, where the defendant asserts the defense of consent, this essential center certainly would include both the facts that arguably manifest consent and those that diminish the credibility of inculpatory evidence accumulated against the defendant. More germane to this case, but related in principle, is the notion that a defendant's opportunity to develop not only the rudiments but also the details of his story cannot be so cramped as to leave his defense drained of its effectiveness. Ascertaining which details are essential in a particular case admittedly may be an exacting and imprecise examination. However, until we are benefitted by further teachings of the Supreme Court, I conclude that this is the inquiry that should be conducted.

In this case, I cannot adopt the majority's characterization that the application of the rape shield statute constitutes a "very minor imposition on Stephens' right to testify." *Ante* at 7. Nevertheless, I accept that Stephens' testimony was appropriately excludable because the testimony was not sufficiently central to his defense to outweigh the interests served by the statute. First, I do not find this case akin to *Chambers*, where the Court invalidated a hearsay rule that barred the defendant from introducing evidence that, if believed, necessarily would have exculpated the defendant.[5] Here the excluded evidence could have been the basis of an inference helpful to Stephens' defense, but it was not shown to be connected to the issue of guilt or innocence to a degree sufficient to establish that its exclusion impacted Stephens' ability to set out

[5] In *Chambers*, the excluded evidence consisted of a confession by another person to the murder for which the defendant was tried. This evidence was patently critical, and therefore could not be excluded.

his version of events and thus affected the outcome of the trial. Second, Stephens *was* able to impeach the complainant's credibility with the suggestion that she may have been angry with him, although not in the detail he would have liked. Furthermore, in my opinion this loss of detail did not constrict significantly the vitality of Stephens' defense. Even if believed, the proposed testimony, while relevant to witness bias, is hardly of the sort that would constitute persuasive evidence that the complainant concocted her story. Any link between Stephens' comments and a decision by the complainant to fabricate a charge of rape was merely conjectural. In this regard, I find it noteworthy that Stephens did not attempt to lessen the potential impact of the loss of the excluded testimony by proffering modified versions of the controversial comments. Such an effort would have given meaningful support to the proposition that the precluded comments were vital to his defense. The decision to rest on the possible error of the trial judge does not suggest intense concern over the significance of the testimony.

In the final analysis, after reviewing the direction given by the statute and contemporary case law, and under the specific circumstances of this case, I am constrained to concur in the decision to affirm the district court and cabin any inclination to chart another constitutional course.

ROVNER, *Circuit Judge*, concurring. Although several of the opinions in this case are quite compelling in their discussion of a difficult constitutional issue, I do not believe that they address the case actually before us. I therefore write separately to explain my view of the issue this case presents—one, I hasten to add, that raises less weighty constitutional concerns than those with which my colleagues have struggled.

My colleagues' opinions all start from the premise that Stephens offered the excluded testimony for the purpose of impeaching the complaining witness, Melissa Wilburn. They assume Stephens' theory to have been that the offensive statements so angered Wilburn that she was prompted to fabricate the charge of attempted rape. *See* plurality Op. at 4; Flaum, J., concurring, at 14-16; Cummings, J. dissenting, at 23-24; Cudahy, J., dissenting, at 27; Coffey, J., dissenting, at 40; Ripple, J., dissenting, at 45-46, 50-51. The content of the remarks was therefore important because the jury would have been unable to fairly assess Stephens' theory without knowing whether the comments were sufficiently inflammatory to cause such a reaction. Based on this understanding, the dissenters have argued that denying Stephens the opportunity to present the testimony has significantly interfered with his constitutional rights. He has, in their view, been prohibited from offering evidence that goes to the heart of his defense, and he has been denied his right to confront an adverse witness. *See* Cudahy, J., dissenting, at 28-33; Ripple, J., dissenting, at 45-46, 50-51; *cf.* Flaum, J., concurring, at 14-15. As the numerous opinions suggest, balancing those weighty interests against the state's interest in excluding the testimony makes for a very difficult case.

But this case does not, in my view, actually raise such troubling questions because, under Stephens' own theory of the case, the evidence was neither central to his defense nor offered for the purpose of impeaching Wilburn. Contrary to my colleagues' assumption, Stephens did not offer the evidence to support a theory of fabrication, but

only to explain why Wilburn had withdrawn her previously-given consent. His only reference to the excluded comments during closing argument makes that clear:[1]

> Lonnie says, something that he said, she told him stop, he stopped. She told him to leave, he left.

(Oct. 23, 1987, Tr. at 58).[2] Although Stephens did argue that Wilburn had invented the charges, his fabrication theory was not related to Wilburn's anger, but focused instead on her desire to placate her landlady's concerns about the disturbance that had transpired. As his lawyer argued in closing:

> [W]e're talking about two and a half hours and an explanation for why she did finally report it to the police. Because she wanted to get out of trouble with her landlady, whether her landlady . . . her landlady is a nice person, she's not going to throw somebody out just because somebody attempted to rape me, but the way she phrased it to her, you have to control it, Melissa believed she had to do something, she has to do something to show this lady, it's not my fault. Glenn Wilburn was there and that's the reason they came down so I'll do something, I'll go make the report.

(*Id.* at 60.)

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[1] Stephens' lawyer did not set out his theory of the case during opening argument, so we must rely solely on his closing argument.

[2] Stephens' lawyer also alluded to Wilburn's purported anger later in his closing argument:

> She says that they stayed up, she was fearful of him coming back, she got Mary Riley up because she was mad, she was upset, her sister is someone she talks to . . . .

(*Id.* at 63).

Even more significantly, Stephens' offer of proof reflects the same theory.[3] Outside the presence of the jury, Stephens' lawyer elicited this testimony from his client:

> I said, I can't say exactly what I said but I said something to the effect, we was doing it and I said that, referred to Tim Hall and Drema and that they, I had mentioned something about them switching partners and she was, it was the fashion we was doing it and she didn't particularly care for what I said and she told me to quit.

(R. 1277.)[4] After stating the content of the offensive comments, Stephens continued:

> And she said, "What did you say?" And I said, and she asked me what I meant by that and I told her and she said, "Stop," and that's when I stopped and she said, "Get out of my house." That's exactly what I said.

(R. 1278.) This testimony again reflects Stephens' theory that the comments had motivated Wilburn to withdraw her consent.

The subsequent colloquy between the attorneys and the court also indicates that Stephens' comments and Wilburn's resulting anger were relevant under Stephens' theory only to explain why Wilburn had withdrawn her consent and asked him to leave:

> [Prosecution]: We would like no further questions directed toward the conversation, that's misleading, that's twice now.

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[3] It is at least arguable that Stephens' approach at closing was determined after the testimony had been excluded, but the offer of proof suggests that the theory of defense was consistent throughout the trial.

[4] Record citations are to page numbers in the state court record.

> Court: Right, the Court will further sustain that, it's up to the point, you know, when you get to that point before you ask what was said next and then, you know, coming up to offer to prove, you know, *was there some reason you stopped.* Let's do the offer to prove before you get into those statements leading up because we're just cutting him right off.
>
> [Defense]: But your honor, you know, I'm cutting it off before I bring up anything about the evidence but I can't even say that, did you say something that made her angry? I can't even point that out to them?
>
> [Prosecution]: Then get to the point when she got angry and he left.
>
> * * *
>
> [Prosecution]: We're at the point where she gets mad and he's leaving so we're done.

(R. 1279-81) (emphasis added). It was thus clear to all present that the only purpose of the testimony was to show why Wilburn had withdrawn her consent. At no time during trial did Stephens suggest that the evidence was relevant to support a theory of fabrication.[5]

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[5] Stephens did allude to that rationale for the first time in a post-trial "Motion to Correct Errors," which stated:

> The purpose behind offering such testimony was that it would tend to support the theory that there was another reason why the prosecuting witness had filed charges against the defendant and that it was necessary to complete the defendant's version of the events.

But that first mention of the theory was of course too late to bring it into consideration. A defendant cannot advance one reason for admitting evidence during trial and then advance a wholly separate basis for admission in post-trial submissions or on appeal. An evidentiary rationale not raised before the trial judge at the time of ruling is waived. *United States v. Biesiadecki*, 933 F.2d 539, 544 & n.1 (7th Cir. 1991).

Nor has Stephens suggested in his argument before this court that the testimony had that significance. His brief before the en banc court stated:

> Stephens['] contention is that the offered testimony is evidence concerning the *res gestae* of the offense. It was offered to show what occurred at the time and place of the alleged offense *not* what the past sexual conduct of the prosecutrix had been.

(Stephens En Banc Br. at 5) (emphasis in original). Indeed, Stephens' answer to the state's petition for rehearing explicitly *denied* that the testimony had been offered in order to demonstrate that Wilburn had a motive to fabricate the attempted rape charge:

> [T]he State has mischaracterized the purpose of the testimony. While the excluded testimony would have been important in showing the source of the alleged victim's anger toward the defendant and thus her underlying motive for fabricating a rape charge against the defendant, it is undeniable that the precipitating event for the filing of the charge was something else entirely. It is undisputed that the alleged victim reported an attempted rape by the defendant in order to placate her landlady who was upset that the police had been called to the trailer. . . . Furthermore, in [his] Reply Brief, the defendant stated the following: "The **primary** relevance of the excluded testimony is that it shows why Wilburn ordered Stephens from her trailer and awakened her sister."
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> * * *
>
> While the primary purpose of the offered testimony was made clear in the brief of the defendant and was then made even more abundantly clear in the Reply Brief, the Supreme Court of Indiana chose to ignore those assertions and state that the statements made by the defendant to the alleged victim "made her so angry she pursued the attempted rape charged against him."

(Answer at 6-7) (emphasis in original) (footnote and citations omitted).[6]

As my colleagues have noted, the constitutional analysis in this case requires us to balance the state's interest in excluding the testimony against Stephens' interest in its admission. The analysis therefore depends entirely on the purpose for which the testimony was offered. Fortunately, we need not decide whether excluding evidence offered to show that the complaining witness was lying is unconstitutional. The only question raised here is whether Stephens should have been allowed to introduce otherwise inadmissible evidence in order to show the precise content—rather than the general nature—of a comment that prompted Wilburn to withdraw her consent. That does indeed seem a more "minor imposition" than the one my colleagues have discussed. It neither goes to the heart of Stephens' defense nor limits his ability to confront adverse witnesses.

Stephens' interest in introducing the testimony for the limited purposes that he envisioned may, in my view, properly be subordinated to the State's interest in excluding the evidence. I therefore concur in the decision to affirm the district court's denial of Stephens' petition.

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[6] The same brief later suggests that impeachment may have been a secondary purpose for offering the testimony. Quoting a district court filing, Stephens writes:

> [The defendant] will accept that the alleged victim's anger over his statements may have contributed to her filing an attempted rape charge; however, that was not his primary purpose in offering the testimony.

(*Id.* at 8.) The brief also later characterizes the original panel opinion—which had concluded that the testimony was offered to show why Wilburn withdrew her consent *and* why she fabricated rape charges—as "incorporating **both** purposes for introduction of the evidence." (*Id.* at 9) (emphasis in original). But these comments cannot overcome Stephens' waiver of the argument by explicitly disclaiming it in the same brief and, even more importantly, by failing to timely make it before the trial court.

CUMMINGS, *Circuit Judge*, joined by CUDAHY and MANION, *Circuit Judges*, dissenting. Lonnie Stephens claims that on the night of March 17, 1987, he made comments to the complainant that caused her to end their consensual sexual encounter, send Stephens immediately from her home, wake her sister, and the next day to file a groundless charge of attempted rape. The content of the offending statement—a cornerstone of Stephens' case—was never presented to the jury, the trial judge having ruled that the proposed testimony was barred by the Indiana Rape Shield Statute, Ind. Code Ann. § 35-37-4-4 (Burns 1985). The exclusion of this evidence indisputably gives rise to a colorable claim that the application of an evidentiary rule, the rape shield statute, has interfered with the defendant's right to present his defense. When a defendant presents such a colorable claim, the task of the court is to balance the exculpatory import of the excluded evidence against the interest of the state manifested in the rule at issue. See *Johnson v. Charns*, 844 F.2d 482, 484 (7th Cir. 1988), certiorari denied, 488 U.S. 835 (1988); *McMorris v. Israel*, 643 F.2d 458, 461 (7th Cir. 1982), certiorari denied, 455 U.S. 967.

The interests served by the Indiana Code § 35-37-4-4 are obvious—and substantial. The Indiana Rape Shield Statute furthers laudable and pragmatic goals. It protects victims from needless exposure of their past sexual conduct; ensures that the focus of rape trials remains the guilt or innocence of the accused rather than the sexual history of the complainant; and, by reducing the embarrassment and anguish of trial, encourages victims to report rapes. Without the protection provided by rape shield statutes, victims may find trial an ordeal not worth enduring. Cf. 124 Cong. Rec. H.11944 (1978) (statement of Rep. Holtzman); Fed. R. Evid. 412 cmt. (1993) ("[M]any [rape victims] find trial almost as degrading as the rape itself. . . ."). Moreover, Indiana has the power to pursue these goals through evidentiary rules—it is each state's "sovereign prerogative" to regulate the presentation of evidence in its courts. *McMorris*, 643 F.2d at 460. Indiana's rape shield

statute is a valid legislative determination that rape victims deserve heightened protection from harassment and unnecessary explorations into their personal life, cf. *Michigan v. Lucas*, 111 S. Ct. 1743, and exceptions to it should not be carved out liberally. Nonetheless, the desire to shield rape victims from harassment must yield in certain cases to another vital goal, the accused's right to present his defense. Sending the innocent to jail, or depriving the guilty of due process, is not a price our Constitution allows us to pay for the legitimate and worthy ambition to protect those already victimized from additional suffering. Though relevant and competent evidence may properly be excluded to accommodate other legitimate interests, *Chambers v. Mississippi*, 410 U.S. 284, 295, evidence with genuine exculpatory potential must be admitted. See *Sharlow v. Israel*, 767 F.2d 373, 377-378 (critical evidence may not be excluded); cf. *Chambers*, 410 U.S. at 302. In the end then, what matters here—and what must be weighed against Indiana's policy choice—is the significance of the contested evidence to Lonnie Stephens' case.

The jury in this case heard conflicting accounts of the events that occurred at the complainant's house trailer: she testified that Lonnie Stephens was an unwelcome guest who attempted to rape her; Stephens testified that he and the complainant were engaging in consensual sex, but that in response to statements he made during intercourse she became angry, ended the encounter, ordered him to leave and fabricated a rape allegation in retaliation. The prosecution offered physical and testimonial evidence tending to corroborate complainant's version. Stephens' account consisted primarily of his own testimony. The plausibility of Stephens' defense turned in substantial part on whether the jury could be persuaded that something Stephens had said to the complainant could have so enraged her that she would have responded in the manner he alleged. Central to Stephens' case then are the words he claims to have said that night, words the jury never heard. Stephens proposed to testify that while he and the complainant were engaged in intercourse "doggy fashion," he said to her "Don't you like it like this? . . . . Tom Hall said you did."

(Trial Tr. at 1278).* Stephens instead was permitted only to testify without elaboration that he had said *something* that angered the complainant. The judge required Stephens to convince the jury of the truth of his story without allowing him to reveal the fragments on which its plausibility turned. He was asked to counter the detailed and vivid depiction offered by the prosecution with a version whose essential elements had been expunged. The jury might well have disbelieved Stephens' testimony even if he had testified fully; however, it is hard to imagine his story being believed absent this evidence.

The majority is dismissive of the significance of Stephens' statements to his defense—the exclusion is but a "very minor burden" on Stephens (p. 7). Stephens, according to the majority, is not harmed by the exclusion because he "was allowed to give [the rest of] his [ ] version of the facts" (p. 7) and little was expurgated. That Stephens was allowed to present the rest of his defense, however, is irrelevant to the question of whether the excluded evidence was in itself important. At issue is not whether Stephens was allowed to present *some* defense, but whether the Sixth Amendment requires that he be allowed to present the specific evidence excluded. Since the majority has failed to explore the exculpatory significance of the excluded evidence, it is not surprising that it concludes that the exclusion of Stephens' testimony is not "disproportionate to the purposes [of] the Indiana Rape Shield Statute" (p. 7)—the majority has weighed only one of the issues to be balanced.

Moreover, I do not believe that allowing the evidence at issue would undermine the operation of the Indiana Rape Shield Statute. The statute may, consistent with the Sixth Amendment, operate to exclude a significant body of evidence—likely, the type of evidence with which the drafters of the legislation were most concerned. Prohibited still is evidence suggesting that because of an alleged vic-

* There was also a statement in the offer of proof apparently alleging that defendant reminded the complainant that she had switched sexual partners with Drema _____ and Tom Hall.

tim's past sexual conduct she probably consented this time or "asked" to have intercourse or other argument that seeks to explain or excuse a rape based on the victim's past behavior. (The Indiana Statute does allow introduction of evidence of the victim's past sexual conduct with the defendant, Ind. Code § 35-37-4-4(b)(1).) Admittedly, allowing Stephens' testimony would create an exception to the statute, but the exception is a narrow one. That Stephens allegedly uttered these comments during the evening in question is not alone sufficient to compel admission. The Sixth Amendment does not create a broad *res gestae* exception to rape shield statutes. Neither does the Sixth Amendment require that the statements be admitted because they have some tendency to aid Stephens' defense. *Chambers*, 410 U.S. at 295 (relevant and competent evidence may be excluded). Rather, Stephens' statements must be admitted here because they are central to his defense.

This is not to say that the purpose of the rape shield statute would not be frustrated at all by the admission of Stephens' offered testimony. Although admitting Stephens' statement is unlikely to transform the trial into an inquiry into the complainant's private life, she would undoubtedly suffer some anguish and embarrassment—anguish and embarrassment from which Indiana, in the cause of encouraging victims to report assaults, has an interest in protecting her. However, the state's interest in allowing rape victims to testify "free of embarrassment and with [their] reputation unblemished must fall before the right of [the defendant] to seek out the truth in the process of defending himself. . . . [T]he State cannot . . . require [the defendant] to bear the full burden of vindicating the State's interest[s]. . . ." *Davis v. Alaska*, 415 U.S. 308, 320.

Allowing Stephens' testimony acknowledges that because the protection of defendants' rights is fundamental to our system, at times other interest may be impaired. Given the significance of the excised testimony to his case, Indiana's interests must yield to Stephens' fundamental constitutional right to present his defense. I, therefore, respectfully dissent.

CUDAHY, *Circuit Judge*, dissenting.

I.

I entirely agree with Judge Cummings that rape shield laws serve a necessary and laudable purpose; on this score as well as on the other issues he has addressed, I join Judge Cummings' persuasive dissent. As President Carter noted when he signed the legislation creating the federal rape shield law, embodied in Federal Rule of Evidence 412, such statutes are "designed to end the public degradation of rape victims and, by protecting victims from humiliation, to encourage the reporting of rape." 14 *Weekly Compilation of Presidential Documents* 1902 (Oct. 30, 1978).

I, however, further agree that in the present circumstances the important (but here somewhat attenuated) interests protected by Indiana's rape shield law must give way to the defendant's right to put on a defense. The central problem to which rape shield legislation is addressed was the common law practice in which courts "considered the victim's character for chastity pertinent to whether or not she consented to the act that led to the charge of rape." Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1 (1977). The testimony that Stephens sought to offer, however, neither sought to prove the victim's character nor was intended to address the question of consent. Rather than attempting to prove the truth of any matter about Wilburn's character, Stephens ostensibly wanted to offer his story to show its effect on the listener. This, of course, is a common distinction in the law of evidence. *See generally* 6 John Henry Wigmore *Evidence* § 1789 (Chadbourn Rev. 1976). Nor was Stephens' testimony intended as evidence of consent, but rather it is evidence of a motive to fabricate. Stephens' theory was that what he said so enraged Wilburn that it led her to concoct a rape charge.[1]

[1] There is some force to the suggestion that this evidence was not introduced *solely* to show a motive to fabricate but also to

(Footnote continued on following page)

None of this suggests that there is any merit to Stephens' claim that he is entitled to habeas relief on the grounds that the Indiana Supreme Court misapplied state law. The Indiana Supreme Court's definitive construction of the state's statute is, as far as the federal courts are concerned, a correct interpretation of state law. *See Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875). But whether the state court gets the state law right or wrong, a defendant is entitled to a writ of habeas corpus only if he is held in custody "in violation of the Constitution or laws . . . of the United States." 28 U.S.C § 2254(a). But, because the scope of a defendant's constitutional right to testify on his own behalf requires a weighing of the relevant interests, it is important to recognize that the state's interest here is not, as the majority would have it, the very interest that undergirds all rape shield legislation. Maj. Op. at 8.

A criminal defendant's right to testify on his own behalf is a part of his larger right to call witnesses and present

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[1] *continued*

explain why Wilburn withdrew her consent and threw Stephens out of the trailer. In fact, Stephens' counsel also suggested that in addition to being upset by Stephens' remarks, Wilburn fabricated the rape charge in order to appease her landlady who was upset by the disturbance. But the Indiana Supreme Court, in reviewing the state court proceeding, found that Stephens sought to introduce the evidence to show *both* the reason why he was thrown out of the trailer *and* as a motive to fabricate. "[According to Stephens] she became so angry she made him stop and leave. He claimed her anger caused her to bring this criminal action against him." *Stephens v. State*, 544 N.E.2d 137, 138-39 (Ind. 1989). The district court on habeas review did not take issue with the state court's description of its proceedings, adding that Stephens further argued that because he was not allowed to introduce the evidence, "he was precluded from presenting his argument to the jury with regard to how the evidence was important." *Stephens v. Morris*, 756 F. Supp. 1137, 1141-42 (N.D. Ind. 1991). While the record does not make clear how prominent a role the excluded evidence would have played in Stephens' defense, I am inclined neither to reject the description of Stephens' defense offered by each of the courts previously to review the proceeding nor to hold Stephens to a higher standard of clarity.

evidence in his defense. *See Rock v. Arkansas*, 483 U.S. 44, 52 (1987). The right to offer the testimony of witnesses is "in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967).

But the defendant's right to present the testimony of witnesses is not boundless. Rather, as the majority explains, it may be required to bow to other legitimate interests. Maj. Op. at 6-7. It is therefore clear that rape shield laws are constitutional, at least when applied to prevent a defendant from introducing—as proof of consent—evidence of the victim's sexual history or reputation. *See Moore v. Duckworth*, 687 F.2d 1063 (7th Cir. 1982); *cf. Michigan v. Lucas*, 111 S. Ct. 1743 (1991) (upholding a procedural requirement of Michigan's rape shield law as against constitutional challenge).

But the balance is a delicate one, far more delicate than the majority's somewhat cursory treatment would suggest. Moreover, our efforts at striking this balance should be sensitive to the guidance that Supreme Court precedent provides. To this end, cases addressing the right to cross-examine witnesses provide a useful benchmark, since the Court has recognized that a defendant's dual rights to cross-examine the prosecution's witnesses and to bring forward his own evidence serve similar interests. "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense." *Washington*, 388 U.S. at 19; *see also* Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567 (1978).

In particular, the Court's decision in *Davis v. Alaska*, 415 U.S. 308 (1974), is instructive here. The Supreme Court there balanced a criminal defendant's right to cross-examine adverse witnesses against a state's interest in protecting

the anonymity of juvenile offenders. In *Davis*, the key prosecution witness was, at the time of trial, on probation by order of a juvenile court. The defendant sought to cross-examine the witness, suggesting to the jury that his probationary status might lead him to curry favor with the prosecutor's office, and might thereby be a source of bias. The trial court—ultimately to be affirmed by the Alaska Supreme Court—refused to allow the cross-examination. According to the trial court, the introduction of such evidence was forbidden by a state law protecting the anonymity of juvenile offenders. The state insisted that this law did not deprive the defendant of his Sixth Amendment rights, citing the state's interest in sheltering juvenile offenders from embarrassment and injury to reputation. The Supreme Court, however, struck the balance otherwise. It held that the defendant's interest in using this evidence—to suggest that the witness had a motive to lie—outweighed the state's interest in protecting the witness's reputation. Since *Davis*, the Court has consistently reaffirmed a defendant's right to introduce evidence suggesting that a witness had a motive to fabricate. *See Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam).

The analogy between *Davis* and the instant case is compelling. As in *Davis*, Stephens sought to show that the prosecution witness had a reason to lie. In addressing a constitutional challenge to rape shield legislation, "*Davis* is clearly apropos when the rape victim's prior sexual conduct has some relevance to establish a *motive for false accusation*." 23 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5387, at 568 (1980) (emphasis added). "*Davis* compels the courts to 'carve a fairly broad exception [for bias impeachment] in statutes generally barring proof of sexual history.' " Edward J. Imwinkelreid, *Exculpatory Evidence* § 8-7, at 199 (1990) (citation omitted).

As far as I have discovered, every court that has applied *Davis* and its progeny to rape shield legislation has found that such laws cannot be invoked to prevent a defendant from introducing evidence that a prosecution witness had

a motive to fabricate.[2] *See United States v. Stamper*, 766 F. Supp. 1396 (W.D.N.C. 1991), *aff'd sub nom. without op. Re One Female Juvenile Victim*, 959 F.2d 231 (4th Cir. 1992) (evidence that victim previously admitted to falsely accusing her mother's boyfriend of sexual molestation must be admitted where victim claims that her father's friend molested her); *Lewis v. State*, 591 So. 2d 922 (Fla. 1991) (evidence of victim's sexual activity to be admitted where victim lied to her mother about her sexual activity and accused her stepfather of rape only days before gynecological examination, scheduled by her mother, to determine whether daughter was sexually active); *State v. DeLawder*, 344 A.2d 446 (Md. App. 1975) (evidence that victim was sexually active must be admitted where victim allegedly accused defendant of rape out of fear of telling her mother that she was pregnant); *State v. Jalo*, 557 P.2d 1359 (Or. App. 1976) (evidence of victim's sexual conduct to be admitted where ten-year-old victim engaged in sexual conduct with defendant's 13 year-old son, and allegedly accused defendant of attempted rape after defendant told victim that he would tell her parents). *Cf. Sandoval v. Acevedo*, 996 F.2d 145 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 307 (1993) (declining to decide—in light of its finding that any error was harmless—whether the Confrontation Clause entitles defendant to impeach victim's own statements about her sexual history); *Wood v. Alaska*, 957 F.2d 1544, 1550 (9th Cir. 1992), quoting *Davis*, 415 U.S. at 318 (while a defendant has a constitutional right to cross-examine witnesses to show the jury facts from which the jurors " 'could appropriately draw inferences relating to the reliability of the witness,' " the fact that here the victim "posed in the nude or acted in pornographic performances does not in any way indicate that she is a dishonest person or had a motive to lie in this case").

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[2] The majority, of course, avoids this question by simply overlooking *Davis* and the particularized constitutional right to present evidence that attacks the credibility of prosecution witnesses.

But this is not to say that a defendant has a constitutional right to trot out a witness' sexual history whenever he claims that this history gives rise to a motive to fabricate. The constitutional right under *Davis* should outweigh the state's interest in protecting rape victims only where the proffered evidence, if true, would plausibly provide the witness with a reason to contrive a rape charge. Some courts appear to have lost sight of this fact. For example, in *Chew v. Texas*, 804 S.W.2d 633 (Tex. App. 1991), *pet. for discretionary rev. ref'd* (July 3, 1991), the court concluded that under *Davis*, the defendant had a Sixth Amendment right to introduce evidence that the victim suffered from the illness of nymphomania, and therefore "had a motive to lie initially about her lack of consent to hide her sexual affliction from the public." *See also Winfield v. Commonwealth*, 301 S.E.2d 15, 21 (Va. 1983) (evidence that victim had extorted money from those with whom she had sexual relations somehow found to be "relevant and probative of a motive to fabricate"). Similarly, in *Commonwealth v. Joyce*, 415 N.E.2d 181, 187 (Mass. 1981), the court concluded that the defendant had a constitutional right to show that the victim was a prostitute, on the theory that such activity had something to do with her motive to lie. According to the court, the victim, who was found naked in a car with the defendant, may have been "motivated falsely to accuse the defendant of rape by a desire to avoid further prosecution." *Id.* For one, such an approach "broadly applied, denies sex workers who dare to complain of sexual violence the presumption of innocence." Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 Harv. L. Rev. 1045, 1057 (1992). Moreover, uncritical acceptance of a defendant's every claim that the victim's sexual history relates to a motive to lie would expand a defendant's right to present a defense—and by the same token undermine the purposes behind rape shield legislation—far beyond the bounds contemplated by the Supreme Court's decisions in *Davis*, *Van Arsdall*, or *Olden*. A defendant has a constitutional right to introduce evidence of the vic-

tim's sexual history only where the court finds it at least plausible that this history could in some way relate to a motive to fabricate.

To do otherwise runs the risk that the narrow exception for evidence of motive to fabricate swallow the entire rape shield law. This would be the result, of course, if a court were to conclude that the fact that a victim was sexually active somehow made her less worthy of belief. Insofar as the courts in *Chew*, *Winfield*, and *Joyce* move in this direction, they read *Davis* too broadly. But drawing a bright line between those cases in which the defendant plausibly suggests that the victim's sexual history does and cases where it does not give rise to a motive to fabricate is no easy task. In the end, it is simply a matter that requires a trial judge to exercise prudent judgment.

Applying this principle to the case at bar presents a difficult question. On the one hand, to suggest that a woman who is shown to have been sexually active would become so angry that she would invent a rape charge may be more than a bit old-fashioned. But on the other, it is the former pervasiveness of this traditionalist view that ultimately led the Congress and forty-eight state legislatures to enact rape shield legislation, protecting rape victims from having to endure trials in which they are cross-examined about their entire sexual past. It is paradoxically *because* being confronted with one's sexual activity—or at least with its more lurid aspects—is thought to be the source of extreme embarrassment that Stephens has a right to present this evidence. Thus, I ultimately conclude that Stephens' claim—that what he told Wilburn so enraged her that it led her to accuse him of rape—is some evidence of a motive to fabricate. As such, the Constitution requires that he be permitted to introduce this evidence at trial. Thus, unlike the overwhelming majority of applications of rape shield laws—applications that pose no serious constitutional difficulty—Indiana's rape shield law here served to deprive Stephens of his constitutional right to present a defense.

II.

The majority, having found no constitutional violation, had no occasion to address the possible question of harmless error. Because I find that Stephens' constitutional rights were violated, I next examine whether this violation may be treated as a harmless error.

While the district court found no constitutional error, it had no hesitation in concluding that, had there been error, it would have been harmless. According to the district court, Stephens' version of the story is "inconceivable" because only fifteen minutes elapsed between the time Stephens arrived at Wilburn's house and the time he arrived at the Straits' house, following the incident. Thus, "the jury would have been hard pressed to believe this whirlwind courtship took place in a matter of fifteen minutes." *Stephens v. Morris*, 756 F. Supp. at 1143. Because the court was "persuaded that no reasonable jury would have found the proffered testimony would have raised a doubt as to the petitioner's guilt," depriving him of his constitutional right to offer that testimony was a harmless error. *Id.*

This is a common approach to harmless error analysis. Where an error is not harmless, the necessary remedy is a new trial. However, many appellate judges (as well as trial judges reviewing state convictions in habeas cases) apparently believe that, where "there is no legally sufficient evidentiary basis for a reasonable jury" to acquit the defendant, there is no point in ordering a new trial. Instead, they essentially enter summary judgment for the prosecution, declaring any constitutional error to be harmless. *See* Fed. R. Civ. P. 56(a)(1).

The only problem with this procedure is that it is patently unconstitutional. All criminal defendants—even the most guilty of them—have a constitutional right to have a jury, not an appellate judge, find them guilty beyond a reasonable doubt. While I do not believe this proposition ever to have been in serious doubt, the Supreme Court, speaking through Justice Scalia, made the matter abundantly clear last Term. The harmless error question asks:

> [N]ot what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks, we have said, to the basis on which the "jury *actually rested* its verdict." The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Sullivan v. Louisiana, 113 S. Ct. 2078, 2081-82 (1993) (citations omitted) (emphasis in original).

This principle helps explain the distinction that the Court drew, in *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991), between "trial errors", which may be treated as harmless, and "structural errors" which may not. While most constitutional errors may be treated as harmless, there are some rights that "are so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. 18, 23 (1967). Where the error so infects the trial that it would be impossible to determine that the error did not affect the jury verdict, harmless error analysis is infeasible, and a rule of *per se* reversal applies. *See* Charles J. Ogletree, Jr., Arizona v. Fulminante: *The Harm of Applying Harmless Error to Coerced Confessions*, 105 Harv. L. Rev. 152, 162 (1991) ("a trial error seems to be one for which we can sometimes know for sure whether it has caused inaccuracy in a trial outcome, and a structural error seems to be one for which we can never know with any certainty").

Most constitutional errors involve the wrongful admission of evidence that ought to be excluded. All such errors are "trial errors," and harmless error analysis is unproblematic. The *Fulminante* Court therefore concluded that in "reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the

admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt." *Fulminante*, 111 S. Ct. at 1265.[3]

Unlike "trial errors," which may be treated as harmless, "structural errors" require *per se* reversal. It is perhaps arguable that the error here—interference with a defendant's right to present evidence—is a structural error. For example, the Supreme Court noted in *Rose v. Clark*, 478 U.S. 570, 578 (1986) (emphasis added), that harmless error analysis "presupposes a trial, at which the defendant, represented by counsel, *may present evidence* and argument before an impartial judge and jury."

But this may overstate the case, as the Court held in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), that a denial of a defendant's right to cross-examine adverse witnesses (which is closely analogous to the right to present evidence) may be treated as harmless. But the mechanics of the analysis are instructive here. In *Van Arsdall*, the Court addressed the argument that all errors involving the erroneous exclusion of evidence require *per se* reversal. "Because it is impossible to know how wrongfully excluded evidence would have affected the jury, the argument runs, reversal is mandated." *Id.* at 683.

The Court rejected this contention. While Confrontation Clause errors are amenable to harmless-error analysis, the "correct inquiry is whether, *assuming that the damaging potential of the cross-examination were fully realized*, a reviewing court might nonetheless say that the error was

[3] The Court's decision in *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), abolished the use of the "harmless beyond a reasonable doubt" standard on habeas review. Instead, the Court found that on collateral review a court is to treat an error as harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 1718, quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). But *Brecht* affects only the standard of review, not the mechanics of the analysis.

harmless beyond a reasonable doubt." *Id.* at 684 (emphasis added).

Fairly read, *Van Arsdall* requires that, where a trial court deprives a defendant of his constitutional right to attack the credibility of a prosecution witness, a reviewing court engaging in harmless error analysis must assume that the defendant would have fully impeached the witness' credibility. In effect, the reviewing court should assume that the impeachment would have been so devastating that the error, in effect, was in *admitting* the testimony of the prosecution witness in the first instance. The court should then engage in the conventional harmless error analysis, setting aside the evidence that was "erroneously admitted," and deciding the effect that this error had on the verdict. If the court is convinced that the verdict did not rely on the testimony of the prosecution witness, the error may be treated as harmless and the conviction affirmed. *Cf. Sandoval*, 996 F.2d at 149-50 (limiting defendant's ability to impeach victim's statements rendered harmless by trial judge's instructing the jury to disregard the statement).

In this case, Stephens sought to introduce testimony suggesting that Wilburn was fabricating the rape charge. Depriving Stephens of his opportunity to testify to this effect was constitutional error. This error was harmless only if the court can say that Wilburn's testimony did not have a "substantial and injurious effect or influence in determining the jury's verdict." Because Wilburn was the key prosecution witness, we obviously cannot make such an assertion.

Because Stephens was denied his constitutional right to testify on his own behalf, and because we cannot conclude that the error was harmless, the district court's denial of habeas corpus relief should be reversed. Stephens is entitled to a new trial, one in which he is permitted to tell his story to the jury. If the story is as implausible as the district court believes, Stephens will again be convicted in short order. But because Stephens' first trial was constitutionally deficient, I respectfully dissent.

COFFEY, *Circuit Judge*, dissenting. The worthy purpose of the Indiana Rape Shield Statute, Ind. Code §§ 35-37-4-4, as I understand it, is to protect rape victims from having their sexual history paraded in front of the jury and to keep the focus of rape trials on the particular crime in question. This habeas appeal calls upon the court to weigh the scales of justice and strike a balance between the criminal defendant's Fourteenth Amendment right to due process with the State of Indiana's interest in protecting rape victims from embarrassment during trial. It is unquestioned that a criminal defendant has a right to testify on his or her own behalf. *United States v. Dunnigan*, 113 S. Ct. 1111, 1117 (1993); *Rock v. Arkansas*, 483 U.S. 44, 52 (1987). This right is derived from the Due Process Clause of the Fourteenth Amendment, *Rock*, 483 U.S. at 51 ("[t]he right to testify on one's own behalf at a criminal trial . . . is one of the rights that 'are essential to due process of law in a fair adversary process' ") (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)), as well as the Sixth Amendment guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process in obtaining witnesses in his favor."

As the other opinions make clear, the issue is whether application of the Indiana rape shield statute barred Stephens from exercising his constitutional right to testify. The other opinions deal with this question as an all or nothing proposition. I am of the opinion that in order to respect both the criminal defendant's constitutional right to present his defense and the State's interest in preventing the disclosure of rape victim's sexual history, a middle road is the course we must pursue. *See Cunningham v. Peters*, 941 F.2d 535, 538 (7th Cir. 1991) ("[t]his case presents a conflict between the rights of criminal defendants under the sixth and fourteenth amendments to present evidence in their own defense and the state's 'sovereign prerogative' to regulate the presentation of evidence in its courts") (quoting *Johnson v. Chrans*, 844 F.2d 482, 484 (7th Cir.),

cert. denied, 488 U.S. 835 (1988)), *cert. denied*, 112 S. Ct. 1484 (1992). The majority dismisses the defendant's appeal to the doctrine of *res gestae*, because allowing a *res gestae* exception to rape shield legislation "would effectively gut rape shield statutes," majority at 8, and because "no court has ever held that *res gestae* is a concept with any constitutional significance." *Id.* at 9. I believe we must give the defendant his day in court and thoroughly analyze his defense before dismissing his argument. Although the term *res gestae* may be obsolete, the principle inherent in the term maintains its vitality. The defendant in this action is merely asking this court that he be granted the opportunity to present his version of the incident in his own words within the limitations of the statute and the Constitution. Essential to his version of the event is the very statement he made contemporaneous with the said act of sexual intercourse that, according to him, prompted the victim to instantly terminate the alleged consensual relationship. A mere paraphrase of his proffered testimony (that he said "something" that caused her to "[tell him] to stop") falls far short of conveying the true impact of the actual repulsive language he allegedly uttered. Regardless of *res gestae*, denying Stephens the opportunity for his day in court would offend due process. *Rock*, 483 U.S. at 51; *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Moreover, I disagree with the majority's observation that allowing a narrow exception to the rape shield statute for the defendant to present testimony central and vital to his defense would undermine rape shield legislation. It would do nothing of the sort. Indeed, fundamental fairness mandates that the defendant be entitled to present evidence that is central to the defense and inextricably intertwined with the alleged criminal behavior. *Id.* Since the testimony falls short of recounting the victim's past sexual conduct or reputation, I have some doubt that it even contravenes the very intent of the rape shield statute. Thus, while rape shield legislation has been adjudged constitutional, *Michigan v. Lucas*, 500 U.S. 145, 111 S. Ct. 1743 (1991), in this instance, a minor exception to the State's interests

in protecting rape victims must be made to accommodate the defendant's constitutional right to present the heart of his defense. Such a narrow exception would be comparable to the exceptions admitting otherwise inadmissible evidence under the Federal Rules of Evidence.

The testimony the defendant seeks to introduce does not go toward discrediting the victim, rather, it goes to the heart of his defense (according to Stephens)—he and the complainant were engaged in consensual sex until his degrading comments triggered her abrupt attitudinal or motivational change causing her not only to terminate the alleged consensual sexual encounter but prompted her to subsequently allege rape. Thus, I would hold that the defendant's constitutional right to testify entitled him to relate to the jury that while allegedly engaged in consensual sex in an animal-type manner, he stated to the complainant something to the effect that he thought she liked to do it "doggie fashion." Admission of this testimony, without mentioning the victim's prior partners, accommodates the defendant's constitutional right to testify and neither flies in the face of nor contravenes the very intent of the rape shield statute which bars evidence of the victim's past sexual conduct. I understand that admission of this small portion of his testimony could very well be argued to create an exception to the rape shield statute. So be it, for the exception, comparable to exceptions under the rules of evidence, is mandated by the Sixth and Fourteenth Amendments which create and protect the constitutional right to testify. Furthermore, to insure this protection, the trial court might give a limiting instruction to the jury directing that the testimony be considered only as to the question of whether Stephens' statement to the victim may have triggered her abrupt attitudinal change and not for assessing her credibility based on her prior sexual conduct. After admission of the testimony, the jury would then be called upon to weigh the question of Stephens' credibility and determine whether in fact he even uttered the statement and whether in the eyes of the trier of fact it was regarded by the victim to

be so degrading that it motivated her to abruptly change her attitude toward Stephens. It is the finder of fact, with all the evidence before it, who "has the best 'opportunity to observe the verbal and nonverbal behavior of the witnesses focusing on the subjects' reactions and responses to the interrogatories, their facial expressions, attitudes, tone of voice, eye contact, posture and body movements,' " and not an appellate court which has nothing before it but the cold pages of the court transcript. *United States v. Tolson*, 988 F.2d 1494 (7th Cir. 1993) (quoting *Churchill v. Waters*, 977 F.2d 1114, 1124 (7th Cir. 1992)).

Stephens' remaining statements present a less compelling constitutional claim and were properly excluded by the trial court because

> "the right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' [*Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).] But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules, a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify."

Rock, 483 U.S. at 55-56 (footnote omitted). Stephens' offer of proof also included the statement that "Tim Hall said you [liked it this way]" and the statement that the victim had swapped partners. Since these statements fly directly in the face of the rape shield statute in that they are explicit references to the victim's reputation and prior sexual conduct, the State's interest in excluding the evidence is greater because the potential embarrassment to the victim is greater. Although exclusion of the testimony will impinge somewhat on the defendant's right to testify, "the right to present relevant testimony is not without limitation," *id.*, and in this instance, the exclusion of the testimony is neither "arbitrary" nor "disproportionate to

the purposes [the exclusion is] designed to serve." *Id.* Accordingly, the testimony naming prior partners and partner swapping was properly deemed inadmissible.

The question remains whether exclusion of the "doggie fashion" comment was harmless error. For appellate judges to speculate what a jury would have done had it heard certain testimony is like stepping into quicksand. *See Sullivan v. Louisiana*, 113 S. Ct. 2078, 2081-82 (1993) ("[T]o hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the finding to support that verdict might be—would violate the jury-trial guarantee. . . . The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action . . . ."). In the case before us, the jury was not allowed to hear the statement that allegedly caused the victim to claim rape, rather the defendant was only permitted to tell the jury that he said "something" that angered the victim. Such a watered down version of his story certainly lacked the impact of the gutter-type words that might conceivably have triggered the victim's alleged explosive attitudinal change. In a case where the testimony of the two individuals was so diametrically opposed, limiting the defendant to a bland paraphrase effectively undermines his constitutional right to testify. In this instance, the Constitution mandates a minor exception to the rape shield statute to allow the defendant to have his day in court to present the very key words to his defense. *Rock*, 483 U.S. at 51. Exclusion of his testimony was not harmless, thus, a remand for a new trial is necessary. I respectfully

DISSENT.

RIPPLE, *Circuit Judge*, dissenting. Today's decision will no doubt be hailed as a very "contemporary" one. However, the correctness of a ruling by Judges of the Third Article is not measured by whether it is "contemporary" but by whether it protects the basic constitutional values that undergird our political and legal order. When viewed from this perspective, the court's decision represents a radical departure from the standards established by the Supreme Court of the United States for the protection of the right of an accused to give evidence in his or her own defense. It also condones an injustice that raises the distinct possibility that an innocent person has been convicted of a most heinous crime. I shall discuss each of these considerations briefly.

1.

As the Supreme Court has reminded us on many occasions, the basic function of the criminal trial is to find, even in the most complex and delicate of human situations, THE TRUTH. At this stage in the development of our constitutional law of criminal procedure, there can be no question that a person accused of a criminal offense has the fundamental right to tell his or her story to the trier of fact. *See Rock v. Arkansas*, 483 U.S. 44, 49 (1987) (stating that "it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense"); *Ferguson v. Georgia*, 365 U.S. 570, 573-82 (1961) (detailing the evolution of the right to testify in one's own behalf). Indeed, the Supreme Court of the United States has long recognized that this right is among those "essential to due process of law in a fair adversary process." *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975); *see also In re Oliver*, 333 U.S. 257, 273 (1948) (stating that a "person's right to . . . an opportunity to be heard in his defense—a right to his day in court—[is] basic in our system of jurisprudence"). In similar fashion, the Compulsory Process Clause of the Sixth Amendment, made applicable to the states by

the Fourteenth Amendment, includes the right of the defendant to take the stand in his or her own behalf. *Rock*, 483 U.S. at 52. Indeed, the Supreme Court has said that "[t]here is no justification for a rule that denies an accused the opportunity to offer his own testimony." *Id.* This right specifically includes "an accused's right to present his own version of the events in his own words." *Id.* Finally, the right of the accused to tell his or her own story in his or her own words is rooted in the Fifth Amendment right to decide whether or not to testify. As the Supreme Court has put it, that guarantee includes the right of the accused to remain silent unless he or she chooses to speak "in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

To be sure, the right to present evidence on one's own behalf is not absolute and may be limited in order to protect an important countervailing governmental interest. For instance, in *Michigan v. Lucas*, 500 U.S. 145 (1991), the Court determined that a state could enforce a state procedural requirement that a defendant provide notice that the defendant planned to introduce evidence of prior sexual conduct by preclusion of the proffered testimony.[1] Nevertheless, although the right of an accused person to present evidence in his or her own defense is not absolute, the cases have demonstrated a consistent mistrust of such restrictions. They have required that the state demonstrate that there is an important interest to be served by such an exclusion. The more critical the excluded evidence to the defense of the accused, the more important must be the asserted state interest. *See Chambers v. Mississippi*, 410 U.S. 284, 293-303 (1973).

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[1] In similar fashion, the Supreme Court has held that enhancing the defendant's sentence because of perjurious testimony is not an impermissible bar on the right to testify in one's own behalf. *United States v. Dunigan*, 113 S. Ct. 1111, 1117 (1993) (collecting cases that hold that the right to testify does not include the right to commit perjury).

Given the Supreme Court's clear affirmation in *Rock* of the right of the accused to tell his or her story to the trier of fact, it is perhaps no accident that the cases of the Supreme Court upon which the State relies have dealt not with the testimony of the defendant. Here, we deal not only with the testimony of the defendant but the testimony of the defendant with respect to the actual criminal act of which he stands accused. The cases deal not with the right of the accused person to present an account of the underlying event from his or her own lips but with the right of the accused to cross-examine witnesses. Even in that latter context, however, the Supreme Court's cases recognize the importance of this guarantee in the proper working of the adversary process. The Court requires that the state court weigh the necessity of a preclusion sanction against the values protected by the Sixth Amendment.[2] Important to the Court's inquiry has been the centrality of the proffered testimony. Attempts to show "prototypical form of bias on the part of the witness," *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986), have always been considered especially important to the preservation of that right. For instance, in *Davis v. Alaska*, 415 U.S. 308 (1974), a case that bears, as Judge Cudahy notes, a striking similarity to our own, the Supreme Court held that the defendant had the right to cross-examine a witness for the prosecution by showing that the witness, on probation at the time, was biased because of his desire to avoid further trouble with authorities. Although state law protected the anonymity of juvenile offenders, the Court held that the need to demonstrate such possible bias outweighed any privacy needs of the witness. In underlining the importance of showing such bias, the Court relied in part on its previous holding in *Greene v. McElroy*, which stated:

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[2] It is also important to note that the preclusion order in the case before us was not aimed at the testimony of the defendant himself.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is *even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers of persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.* We have formalized these protections in the requirements of confrontation and cross-examination.

360 U.S. 474, 496 (1959) (emphasis added).

The cases of the Supreme Court have also made crystal clear that, in assessing the importance of the testimony, it is of utmost importance to be sensitive to the realities of human life and the actions and reactions of real people. For instance, in *Olden v. Kentucky*, 488 U.S. 227 (1988), the Supreme Court summarily reversed an exclusion by the courts of Kentucky of evidence that the complainant in a sexual misconduct trial was living with the prosecution's key corroborative witness at the time of trial. The Court noted that the defendant's desire to demonstrate that the complainant had a motive to lie in order to protect her current relationship was an attempt to demonstrate a " 'prototypical form of bias.' " *Id.* at 231 (quoting *Davis*, 475 U.S. at 680). The possibility that the jury might be prejudiced by the victim's interracial relationship was not, held the Court, sufficient to justify denying the defendant the opportunity to demonstrate that the complainant's interest in protecting the current relationship had resulted in her bias. *Id.* at 232.

2.

Jury service in this case must have been a very difficult task. The record reveals that the jurors were asked to resolve sharply contested versions of what occurred in the complainant's trailer on the night of March 17, 1987.

The complainant was able to relate fully to the jury her account. She was asleep on the couch when the defendant arrived. Her sister and brother-in-law were asleep in the guest room off the kitchen. Her son and her nephew were asleep in a bedroom off the hallway which also was located near the bathroom. When the complainant awoke, the defendant was standing in the front door inside the trailer. He sat down beside her and made sexual suggestions and attempted to kiss her. She told him of the presence of others in the trailer and called out for her sister. He ceased his advances for the moment, but then began holding her and attempted once again to kiss her. She called out once again for her sister who still did not respond. The defendant said he would go but first needed to use the bathroom. He walked down the hall and then returned to the complainant and angrily told her that she had lied about the presence of others in the trailer. He then threw her down on the couch, pressed his hand across her mouth to suppress a scream she was about to utter. He pressed his body against hers, undid her bra, and tore a button from her shirt. As he reached to undo his trousers, the victim flipped him off her and ran into the bedroom off the kitchen while shouting for her sister and brother-in-law.

The defendant's version of the facts is quite different. Some of it was heard by the jury; some was not. According to him, he arrived at the defendant's trailer around 10:00 p.m. pursuant to a standing invitation to visit sometime. He testified that, when he arrived, the complainant was awake and, after a brief conversation, invited him into the trailer. He further testified that, at the complainant's suggestion, he carried her child to her bedroom and then rejoined the complainant on the couch. After a few moments of small talk about her pending divorce, the de-

fendant asked the complainant if he could give her a kiss. While kissing her he fondled her breast and unhooked her bra. Because the complainant could not lie down comfortably on the couch, she suggested that they lie down on the floor. Together, they moved the coffee table and placed it against a chair opposite the couch. The defendant began to remove his clothes and then assisted the complainant in the removal of hers.

Up to this point, the defendant, like the complainant, had been allowed to tell his story to the jury. But now, at the crucial point of whether the sexual intercourse was consensual, the defendant was prohibited from telling the jury his version of what transpired. He had wanted to tell the jury that, while he and the complainant were engaging in consensual sexual intercourse, he said to her that another couple had told him that they had been involved in a sexual partner switching arrangement in which she had also participated and that she liked to engage in sexual intercourse "doggy fashion." The defendant wished to testify that *this remark of his* so angered the complainant that she made him stop and told him to leave. As he left, he heard her call for her sister. The jury, however, never heard what the defendant claims he said that elicited such a strong reaction from the complaining witness. Instead, the trial court restricted him to saying that he had said "something" that made her angry.

As is often the case in these situations, some of the evidence from sources other than the participants supports the complaining witness' version and some supports the defendant's version. The defendant arrived at the home of friends around 10:15 p.m. He did not reveal that he had been to the complainant's home, but told them that he had been left at McHughes' Pic Pac by his friend Stone. He testified that he told them this story because he did not want them to know that he had been to the complainant's trailer and had engaged in sexual intercourse with her. He left at about 11:10 p.m. At about 12:30, the complainant's former husband arrived at the defendant's trailer and accused the defendant of attempting to have sexual

intercourse with "his old lady." The defendant denied the charge. The defendant also admitted that he had told his girlfriend four different versions of the event and explained his untruths on the ground that, had she known that he had had sexual intercourse with the complainant, she might have left him and taken the children. It is also clear that Stone, the friend who drove the defendant to the complainant's house, initially lied at the defendant's behest.

If, on balance, the post-incident activities of the defendant do not enhance his story (although it is difficult to estimate the weight a jury might give such matters), some, although not all, of the post-incident activities of the complainant certainly present matters that make her version of the incident susceptible to adverse interpretation. After waking her sister and brother-in-law, the complainant appeared visibly upset. Her brother-in-law said he saw a man in a red shirt running in a southeasterly direction. The complainant told her sister what had happened and asked her if there were marks on her face. The sister observed marks on the entire face as if someone had placed a hand over her mouth. At about 11:30 p.m., the complainant received a call from her estranged husband, who was supposed to have visited that night and called to say that he would be late. The complainant told her husband that the defendant had tried to rape her. The husband, after stopping at Stephen's residence, came to the trailer at about 1:00 or 1:30 a.m. The husband was in an agitated state; his noise awoke the complainant's sister and brother-in-law and a verbal and physical altercation ensued between the two men. The complainant's sister called the police. When the police responded to the call, neither the complainant nor anyone else informed the officers of the alleged attempted rape. Indeed, no report was made of the attempted rape to the authorities until, on the following evening, the complainant was confronted by her landlady who complained about the noise in the trailer during the altercation between the complainant's husband and brother-in-law. The landlady told the complainant that she would tolerate no problems in the trailer park. The complainant

told the landlady that the police had been called because an intruder had been in her trailer and "that's what the fight was over." Tr. 573. She did not mention an attempted rape. The landlady suggested that the complainant go to the police and seek a restraining order. The complainant, in the company of her brother-in-law, then went to the police station and reported the incident with the defendant the night before as an attempted rape.

As in *Olden*, these facts required the jury to make a careful judgment on a delicate human situation in which the perspectives, motivations, and emotions of the various actors were, as they often are in such a case, complex and subtle. Ascertaining THE TRUTH to a degree of certainty that would justify the imposition of criminal liability and a twenty year sentence was an awesome responsibility.

As a practical matter, if the defendant was to be exonerated with respect to this accusation, he had to convince the jury that his encounter with the complainant was, from start to finish, consensual. He therefore had to ask the jury to make a crucial assessment of his credibility as opposed to that of the complainant. This task required the members of the jury to assess his personality as well as hers and to assess the cultural environment in which the two lived and interacted with others. What might have seemed a very implausible story if told by others from a different cultural environment may have been very plausible when told by the defendant. Whether the complainant consented to have sexual intercourse with the defendant and whether the statement that was allegedly made to her would have caused her to withdraw that consent and become so infuriated as to recharacterize the encounter when it suited her convenience is an issue upon which the cold record reveals little. Ascertaining THE TRUTH required a careful assessment of personalities, demeanor, and temperament of the two individuals. To limit the defendant to testifying that he said "something" that angered her is to deprive the jury of the essence of his testimony. It was the rawness of what he allegedly said that would have given substance to his testimony. Only

after being apprised of that statement and ascertaining whether such an utterance, made when it was made, would produce the reaction it did in this particular complainant could the jury have determined whether the statement was made and, if made, whether it produced the alleged reaction.

It is doubtful that many trial attorneys experienced in criminal matters, whether as prosecutors or as defense counsel, will be able to read the majority opinion and maintain any reasonable intellectual comfort level that THE TRUTH was indeed ascertained. The reason for this unease is quite apparent. The defendant was forbidden from presenting to the jury evidence that was central to his defense—a description of the event in question. If that description had been accepted by the jury, he would have been free of all criminal responsibility. As Judge Cummings points out, the majority carefully steers clear of assessing just how central this testimony was to the defendant's defense. The majority also fails to deal adequately with the reality that the proffered testimony would not have been admitted for its truth, but simply to show that there was a serious reason for the victim to have been enraged and to have reacted as the defendant submits that she did react. Indeed, simply to tell a jury that the victim became angered by an undisclosed statement of the defendant, while forbidding the defendant an opportunity to disclose the statement that triggered such a violent reaction under the circumstances, is not only to prevent the defendant from telling his side of the encounter, but to cast him as evasive—a damning characterization under the circumstances presented here. The trial court's decision not only deprived the defendant of the ability to give, from his own mouth, his own version of the event, but the bland substitution also portrayed him to the jury as someone less than frank. A juror, realizing the importance of the testimony to the defendant's case, certainly would expect that he be quite a bit more specific than "I said something to make her angry." The trial court not only denied him the right to tell the jury his own story, it also

rewrote the script in a fashion that portrayed him as someone unworthy of belief because of the vagueness of his reply.

Few cases within our habeas jurisdiction raise serious issues as to the guilt or innocence of the defendant. Here, however, we do not deal with a technical nicety of criminal procedure. We are confronted with the reality that THE TRUTH might have been hidden from the jury. This case thus leaves us with the haunting fear that, had the jury been allowed to hear both sides of the story and evaluate the demeanor of both witnesses as they told what happened, the result may well have been different. The responsibility for this result must rest on other shoulders.[3] I would reverse the judgment of the district court. The state must permit the defendant to tell his side of the story before it deprives him of 20 years of his life.

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[3] Indeed, the majority makes it clear that *it* disbelieves the defendant's story. It is, however, the prerogative of the jury in the state proceeding to reach a conclusion on that issue, not a federal court on habeas appeal.

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—1-6-94

In the
United States Court of Appeals
For the Seventh Circuit

No. 91-1690

LONNIE K. STEPHENS,

Petitioner-Appellant,

v.

CHARLES B. MILLER, Warden, and ATTORNEY GENERAL OF THE STATE OF INDIANA,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, Fort Wayne Division.
No. 90 C 68—William C. Lee, *Judge.*

ARGUED SEPTEMBER 19, 1991—DECIDED MARCH 26, 1993

Before CUMMINGS and RIPPLE, *Circuit Judges*, and REYNOLDS, *Senior District Judge.*[1]

REYNOLDS, *Senior District Judge.* A jury found Lonnie Stephens ("Stephens") guilty of attempted rape. The Indiana Supreme Court, with two justices dissenting, affirmed the conviction. Stephens then petitioned the United States District Court, Northern District of Indiana ("dis-

[1] The Honorable John W. Reynolds, Senior District Judge for the Eastern District of Wisconsin, is sitting by designation.

trict court"), for a writ of habeas corpus. Stephens argues that the trial judge incorrectly excluded a portion of Stephens' testimony. The testimony concerned the specific contents of a conversation Stephens alleges took place during the incident from which the attempted rape allegation arose. On February 8, 1991, the district court denied Stephens' petition for a writ of habeas corpus, concluding that Stephens' Sixth Amendment right to testify was not violated when the trial court excluded the testimony. The district court further concluded that even if Stephens' Sixth Amendment rights were violated, the error is harmless because Stephens lacked credibility and his version of the incident is virtually impossible.

Stephens appeals the district court's denial of his petition for a writ of habeas corpus. For the reasons discussed below, we grant Stephens' petition.

I. FACTS

On March 17, 1987, Stephens and his friend, David Stone ("Stone"), did automotive work together during the day and later went out drinking. Apparently Stone dropped Stephens off that evening at Melissa Wilburn's ("Wilburn") trailer.[2] Stephens and Wilburn gave vastly different accounts at trial regarding the events that followed.

Stephens' version as told at trial[3] recounts an incident of consensual sexual intercourse. Stephens had previously talked with Wilburn, who told him that she was separated from her husband and had moved. Wilburn invited Stephens to visit her sometime. On the evening of March

[2] On direct examination, Stone testified that he dropped Stephens off at Hughe's Pic a Pac Liquor Store. On cross-examination, Stone admitted that Stephens had asked Stone to lie and that Stone had really dropped Stephens off at Wilburn's trailer.

[3] Stephens gave a number of different versions of the incident to various people prior to trial. These versions, however, were not given under oath.

17, 1987, Stephens told Stone to take him to Wilburn's trailer because he was drunk and did not want to go home in that condition. When Stone dropped Stephens off at the trailer, Stephens knocked on the door and Wilburn let him in. Wilburn told Stephens she could take him home, so Stephens told Stone to leave.

When Stephens entered the trailer, Wilburn's son was asleep on the couch so Stephens carried him to bed. Wilburn's sister, brother-in-law, and their child were also sleeping in the trailer. None of them arose while Stephens was present. Stephens and Wilburn talked in the living room, and Wilburn told Stephens he could kiss her. The two engaged in foreplay and decided to have sex. While engaged in intercourse, Stephens made a comment about Wilburn's sexual practices[4] that made Wilburn angry and she told Stephens to stop. Stephens stopped, got dressed, and left the trailer. He heard Wilburn call her sister as he was leaving.

Because it was cold, Stephens began to run as he neared a highway on his way home. He went to an acquaintance's house and told the people there that he was coming from the liquor store where Stone had left him. Stephens made no mention of being at Wilburn's trailer.

In contrast, Wilburn testified that Stephens was an unwelcome guest who attempted to rape her. On the evening of the incident, Wilburn was sleeping on the couch when Stephens entered the trailer uninvited. Stephens then proceeded to make sexual advances which Wilburn rebuffed, and Wilburn said he should leave. Wilburn yelled her sister's name three times; she yelled the loudest the third time. Stephens said he would use the bathroom and then leave. When Stephens returned from the bathroom,

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[4] Stephens testified during an offer of proof that they were engaged in intercourse "doggy fashion" and he said to her "Don't you like it like this? . . . Tim Hall said you did." (Trial Tr. at 1278.) Additionally, Stephens claims that he said something regarding switching partners with a couple.

he threw Wilburn on the couch, got on top of her, held her arms, covered her mouth when she tried to scream, and unfastened his pants. Stephens also tore Wilburn's shirt and bra in the process. Wilburn struggled and eventually pushed Stephens off, and he fell to the floor. Wilburn ran to the room where her sister and brother-in-law were sleeping, and Stephens ran out of the trailer.[5] Wilburn had handprints on her face following the incident.[6]

After Stephens left, Wilburn's sister and brother-in-law arose, and Wilburn called her estranged husband. He arrived at the trailer approximately two hours later, and got into a fight with the brother-in-law. Because of the fight, the sister called the police. When the police arrived, the situation had calmed down. No one mentioned the incident with Stephens to the police.

The next day, Wilburn's landlady complained about the police presence. Wilburn told her the police were summoned because Stephens had entered her trailer uninvited. Wilburn testified that the landlady said she should file a police report. Wilburn testified that she did not know that attempted rape was a crime because it was not a "completed act." Later that afternoon, Wilburn reported to the police that Stephens had attempted to rape her.

II. ANALYSIS

This court has jurisdiction over this appeal pursuant to 28 U.S.C. § 2253, which provides that a final order issued

[5] Wilburn's brother-in-law testified that he saw a man in a red shirt and blue jeans running away from the trailer. In contrast, Stephens testified that he did not run as he left the trailer. Wilburn testified that Stephens was wearing a red T-shirt and jeans. Witnesses who saw Stephens later that evening also testified that Stephens was wearing a red shirt and jeans. Stephens initially told the investigating officer that he was wearing something else that evening.

[6] Wilburn's sister testified that she also saw the handprints following the incident.

by a district judge is subject to review by the United States Court of Appeals for the circuit in which that district court is situated. The issues presented by Stephens to this court are whether (1) the Indiana Rape Shield Statute prohibits Stephens' testimony regarding the *res gestae* of the offense and (2) the Indiana Rape Shield Statute is unconstitutional if it precludes Stephens' testimony. In addition, we must determine whether the trial court's refusal to allow Stephens to testify, if erroneous, was nevertheless harmless.

The Indiana Rape Shield Statute states in relevant part:

> In a prosecution for a sex crime as defined in IC 35-42-4:
>
> (1) Evidence of the victim's past sexual conduct;
>
> . . . .
>
> (3) Opinion evidence of the victim's past sexual conduct;
>
> . . . .
>
> (5) Reputation evidence of the victim's past sexual conduct;
>
> . . . .
>
> may not be admitted, nor may reference be made to this evidence in the presence of the jury, except as provided in this chapter.

Ind. Code Ann. § 35-37-4-4 (Burns 1985) ("the Rape Shield Law"). Indiana has legitimate interests in protecting rape victims, which can be met by the Rape Shield Law. *See Moore v. Duckworth*, 687 F.2d 1063, 1065 n.2 (7th Cir. 1982);[7] *Thomas v. State*, 471 N.E.2d 681 (Ind. 1982).

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[7] In *Moore*, this court questioned "the mechanical application of Indiana's Rape Shield Law to the special circumstances" presented in that case. *Moore* at 1067. In that case, the trial court attempted to prevent the jury from discovering that the rape victim was pregnant; she was pregnant not as a result of the rape. The Rape Shield Law at the time did not address such a situation; it was subsequently amended in 1983.

Exclusion of the Testimony

The trial judge allowed Stephens to testify that he said something to Wilburn during intercourse which made her angry. The trial judge did not allow Stephens to testify regarding the specific contents of the conversation, ruling that the Rape Shield Law barred the testimony. Stephens argues that the conversation's contents go to the *res gestae* of the offense; the purpose of the testimony was to show what occurred during the incident, not to bring in evidence of Wilburn's past sexual conduct. Stephens' defense was that he and Wilburn engaged in consensual sexual intercourse. His testimony was offered to support his theory that when he made the statements, Wilburn became so angry that she told him to leave and fabricated the rape accusation. Stephens seeks to treat the testimony as hearsay, arguing that the jury could easily have been instructed that the testimony was not being offered for its truth.

The district court concluded that the trial judge properly balanced Stephens' Sixth Amendment right to testify with the procedural limitations imposed by the Rape Shield Law. The district court agreed with the trial court that Stephens should have filed a written motion to introduce the conversation pursuant to Ind. Code § 35-37-4-4(b), which provides:

> (b) Notwithstanding subsection (a) evidence:
>
> (1) Of the victim's or a witness's past sexual conduct with the defendant;
>
> (2) Which in a specific instance of sexual activity shows that some person other than the defendant committed the act upon which the prosecution is founded;
>
> (3) That the victim's pregnancy at the time of trial was not caused by the defendant;
>
> may be introduced if the judge finds, under the procedure provided in subsection (c) of this section, that it is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Subsection (c) provides that a written motion be filed at least ten days before trial, a hearing be conducted, and the court enter an order regarding the specific treatment of the evidence at trial.

The district court states that this procedure should have been followed to offer evidence of an exception to the Rape Shield Law. Stephens' testimony, however, does not fall into the categories defined by § 35-37-4-4(b). Failure to follow the statutorily-prescribed procedure therefore does not preclude Stephens' testimony regarding the conversation's contents.[8]

An accused in a criminal trial has a right to offer testimony in support of his defense, including his own testimony. *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987); *Chambers v. Mississippi*, 410 U.S. 284 (1973). Such a right to testify in one's defense stems from the Fourteenth Amendment's guarantee against deprivation of liberty without due process of law; the Compulsory Process Clause of the Sixth Amendment, as applied to the States by the Fourteenth Amendment; and is a corollary of the Fifth Amendment's guarantee against compelled testimony. *Rock* at 51-53. In this case, the conversation's contents are intimately related to the events that took place on March 17, 1987, and provide the foundation for Stephens' entire defense.

Stephens did not propose to offer the testimony as evidence of Wilburn's past sexual conduct; rather, he sought to introduce the conversation as an explanation of the incident, and to support his argument that he made Wilburn so angry that she fabricated the rape accusation. Without the testimony regarding the conversation's contents, Stephens' defense to the attempted rape charge was substantially weakened. Had Stephens told the jury what he

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[8] We note that even if the procedural requirements were applicable to the testimony, it would not be proper to exclude it on a technicality without looking to the specific factual circumstances and consequences of exclusion. *See Michigan v. Lucas*, 111 S. Ct. 1743 (1991).

allegedly said to Wilburn during consensual intercourse, the jury may have reached a different conclusion regarding Stephens' guilt.

We agree with the two dissenting justices of the Indiana Supreme Court that Stephens' Sixth Amendment right to testify on his own behalf guarantees him the right to tell a jury a full account of his version of the incident, including the specific contents of the conversation. The exclusion of Stephens' testimony under the Rape Shield Law was not constitutionally permissible. Stephens had the right to present his defense; the limitation on his testimony deprived him of a fair trial.

Harmless Error

28 U.S.C. § 2111 provides that "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." Constitutional errors may be deemed harmless in certain circumstances. *Chapman v. California*, 386 U.S. 18, 22 (1967). To be harmless, a constitutional error must have been harmless beyond a reasonable doubt. *Id.* at 24. We review the trial record to determine whether it establishes Stephens' guilt beyond a reasonable doubt and therefore serves the interests of justice. *Rose v. Clark*, 478 U.S. 570, 579 (1986).

In reviewing the transcript, we do not agree with the district court that even if exclusion of the testimony was error, it was harmless. The district court gave several reasons for this conclusion, which reasons essentially stem from the district court's opinion that Stephens' version as told at trial is unbelievable. We do not agree that Stephens' account of the incident is necessarily impossible.

As with Stephens' version, Wilburn's account of the incident has certain key aspects which are questionable. For example, although Wilburn allegedly yelled several times while she attempted to ward off Stephens, her sister and brother-in-law did not awake until after Stephens had left.

Also, while Wilburn was eventually able to push Stephens off her, Stephens initially was able to simultaneously hold her arms, cover her mouth, rip her shirt and bra, and unfasten his pants. Finally, Wilburn's failure to mention the incident to the police officer at the trailer may be skeptically viewed by some.

Stephens has the right to present his entire version of the incident to the jury. The jury should have been allowed to hear Stephens' unabridged account of the incident in order to properly balance the credibility and believability of both Stephens' and Wilburn's testimony.

We therefore grant Stephens' petition for a writ of habeas corpus and remand this action to the district court for further proceedings consistent with this opinion.

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 21, 1993.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. JOHN W. REYNOLDS, Senior District Judge[1]

Appeal from the United States District Court for the Northern District of Indiana
No. 90 C 68
William C. Lee, Judge

LONNIE K. STEPHENS,
Petitioner-Appellant,

NO. 91-1690 vs.

CHARLES B. MILLER, Warden, and ATTORNEY GENERAL OF THE STATE OF INDIANA,
Respondents-Appellees.

O R D E R

The opinion issued in the above-entitled case on March 26, 1993, is hereby amended as follows:

Page 8, paragraph 2, line 7 is

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[1]The Honorable John W. Reynolds, Senior District Judge for the Eastern District of Wisconsin, is sitting by designation.

deleted after "(1967)." and the following is inserted: A constitutional error is not harmless if it had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 113 S. Ct. 1710, 1722 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

Page 9, paragraph 1, the following is inserted as the last sentence: We conclude that the trial court's exclusion of Stephens' testimony had an "injurious effect" on the jury's finding that Stephens was guilty of attempted rape.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

LONNIE K. STEPHENS Petitioner, v. LETA MORRIS, Probation Officer; and ATTORNEY GENERAL, STATE OF INDIANA, Respondents.	)	CIVIL NO. F90-68

ORDER

This matter is before the court on a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. Petitioner was sentenced to twenty (20) years for an attempted rape, a class B felony, which he was convicted on October 27, 1987. The conviction was affirmed by the Indiana Supreme Court. Stephens v. State, 544 N.E.2d 137 (Ind.1989). Having exhausted his state remedies, petitioner turned to this federal court for relief.

Stephens challenges his conviction on the following grounds:

(1) The Indiana Rape Shield Statute should not be construed as to preclude testimony concerning statements and acts of the principals at the time and place of the alleged offense.

(2) A statutory rule of evidence such as the Rape Shield Statute cannot "take precedence" over due process of law.

For the following reasons, the petitioner's application for writ of habeas corpus will be DENIED.

Facts

On the evening of March 17, 1987, the petitioner, Lonnie Stephens ("Stephens") went to the house trailer of the prosecutrix. Also at the trailer that evening were the prosecutrix's son, age four; her sister and brother-in-law, and their son, age three months. The entire time Stephens was there, both the sister and the brother-in-law and the two children remained asleep. Both the prosecutrix and the defendant tell vastly different versions of what took place

that evening. There was no physical evidence nor were there witnesses. Petitioners asserts that the crucial factor in his appeal is that he was prevented from relating his entire version of the events of the evening.

Testimony of Prosecutrix

The prosecutrix asserted that Stephens came into her home through an unlocked front door while she was asleep on the couch. She said upright on the couch and Stephens sat down next to her and put his arms around her. She moved down the couch and Stephens followed her and again put his arm around her. This action was repeated a second time, after which the prosecutrix yelled for her sister. After Stephens removed his arm, the prosecutrix asked the petitioner to leave. Stephens put his arm around her again and this time he attempted to kiss her. The prosecutrix yelled for her

sister, this time at the top of her lungs. Stephens retreated momentarily, then tried to put his arms around her. The prosecutrix was able to knock him to the floor, causing him to collide with the coffee table. The prosecutrix yelled for her sister a third time, and again, no one responded. Stephens got to his knees and attempted to kiss the victim's feet. At some point during these activities, Stephens unfastened the prosecutrix's bra and ripped her shirt.

Stephens finally agreed to leave but asked if he could use the bathroom first. When he returned he asked the prosecutrix whose little boy was in the bedroom. The prosecutrix replied he was her sister's. Stephens became upset and threw the prosecutrix on the couch because he felt she had lied about who was in the trailer. He put one hand over her mouth and put his other hand on her jeans

between her legs. Stephens began to unfasten her pants but the prosecutrix was able to shift her body weight which caused the petitioner to lose his balance and fall to the floor. The prosecutrix then got up from the couch and ran to the bedroom where her sister and brother-in-law were asleep.

After waking her sister and brother-in-law, the prosecutrix testified that her brother-in-law got up and looked out the window by the front door. He testified that he saw a man in a red shirt running in a southeasterly direction. Visibly upset, the prosecutrix told her sister what had just transpired. The prosecutrix asked her sister if she could see any marks on her face. Her sister testified that there were marks on the prosecutrix's entire face. Her sister further testified that it appeared as if someone had put their hand over her

mouth, the impressions from their fingers were still visible on her cheek.

Around 11:30 P.M., the prosecutrix received a telephone call from her estranged husband. He had previously arranged to be at the trailer at 10:00 that evening to visit their son. The prosecutrix told her husband that Stephens tried to rape her. Her husband finally arrived between 1:00 A.M. and 1:30 A.M., after he had first stopped by the Stephens residence.

When her husband arrived, he was in an agitated state and made enough noise to wake the prosecutrix's sister and brother-in-law. Her brother-in-law and husband became involved in a verbal and physical altercation which caused the prosecutrix's sister to call the police. By the time the police arrived the situation between the two men had calmed down. While the police were present,

neither the prosecutrix or any other person told the police about the alleged attempted rape by Stephens. In fact, there was no report made to any law enforcement agency about Stephens until after the prosecutrix was confronted by her landlady.

The following evening the prosecutrix was in an automobile with her brother-in-law when she was stopped by the landlady, Pat Bosworth, who complained about the police being called for the disturbance in her trailer. The landlady told the prosecutrix that she would not have any problems in her trailer park. Even though the landlady was talking about the police being called in response to the fight between her husband and brother-in-law, the prosecutrix indicated to the landlady that the police were called because Stephens was an intruder in her trailer.

The landlady suggested that the prosecutrix go to the police to get a restraining order. The prosecutrix and her brother-in-law went to the Blackford County Jail where the prosecutrix stated that she needed to report an attempted rape. She was referred to the Hartford City Police Department, where she made the report.

Testimony of Lonnie Stephens

After almost a full day of drinking beer with David Stone, Stephens asked Stone to drop him off at the prosecutrix's. Since he was drunk and already late in getting home, Stephens decided instead of going home and having his girlfriend get mad at him, he would take the prosecutrix up on her open invitation for him to visit sometime. Stephens maintained that when he arrived at the trailer at about 10:00 P.M., the prosecutrix was awake and after a brief

conversation she invited him in. Stephens motioned to Stone that it was alright to leave without him. Initially, on direct examination by the State, Stone gave a completely different version of the events. Stone testified that he dropped Stephens off a liquor store near the trailer park, however, on cross-examination Stone acknowledged that he had dropped petitioner off at the prosecutrix's and had perjured himself on behalf of the petitioner.

At the prosecutrix's suggestion, Stephens carried her sleeping child from the living room couch into her bedroom. Stephens returned to the living room and joined the prosecutrix on the couch. After a few minutes of small talk about her pending divorce, Stephens asked the prosecutrix if he could give her a kiss. While kissing, Stephens began to play with the prosecutrix's breast and

eventually unfastened her bra. Since they could not lie down comfortably on the couch, the prosecutrix suggested they lay down on the floor. Both the prosecutrix and Stephens helped move the coffee table and pushed it against a chair opposite the couch. Stephens started undressing and also helped undress the prosecutrix; first her shirt and then removing her bra the rest of the way off. After removing their pants the parties engaged in sexual intercourse. Stephens stated that while they were having intercourse he told her that Tim and Drema Hall told him that they had participated in sexual partner switching in which the she was involved and that she had the reputation of liking sexual intercourse "doggy fashion." Stephens testified that the prosecutrix became so angry she made him stop and told him to leave. Stephens immediately got dressed and as he was leaving he

heard the prosecutrix call for her sister.

Once outside Stephens said he went in a southeasterly direction, first walking rather quickly, then running. It was about thirty (30) degrees outside and his coat was in the back seat of Stone's car. Not sure where he was going, Stephens then remember that Stone's nephew, Michael lived nearby. Continuing in the direction toward Michael Stone's house, Stephens testified that he recognized the house of Jeff and Lisa Strait and stopped there instead of Michael Stone's. Jeff Strait was the nephew of another of Stephens' best friends, Bruce Strait and not someone Stephens generally ran around with. Nevertheless, it was freezing out and he needed to get out of the cold. Stephen arrived at the Strait's home around 10:15 P.M., where he found Jeff Strait and

Steve Barnes watching a home video of a motorcycle race. Stephens told Strait that he and David Stone had been riding around and that Stone had left him at Hughes Pic a Pac. Stephens testified that he lied to Strait and Barnes because he did not want them to know he had been at the prosecutrix's trailer and had had sex with her and to explain why he did not have a coat on. Stephens stayed and finished watching the video with Strait and Barnes and at about 11:10, Barnes took the petitioner home.

Between 12:30 A.M. and 1:00 A.M., the prosecutrix's husband appeared at the Stephens' trailer demanding to speak to Stephens. The husband asked Stephens what was he doing "trying to screw his old lady." Stephens denied the charge and after an exchange of words, the husband left the trailer.

Stephens admitted telling his

girlfriend four different versions of what happened that evening. In the first version, the night the prosecutrix's husband confronted Stephens at his home, he denied that he ever saw the prosecutrix that evening. Stone and he were separated at the liquor store and he walked over to the Strait's to get a ride home. The next account was told the night he was arrested. He admitted he saw the prosecutrix, but only spoke to her on her porch; he never went inside the trailer. This was also the version he gave to Officer Allen Bell in the official police report of the incident. The third version was told after he was released from jail. He still denied that he went inside the trailer, but admitted that Stone dropped him off the prosecutrix's trailer instead of the liquor store. The final version came after Stone perjured himself and his girlfriend had been deposed. Stephens

admitted that he was inside the trailer and in fact had sex with the prosecutrix. Stephens maintained that he lied because he was afraid his girlfriend would leave him and take the children.

Background

Petitioner's principal argument poses a constitutional challenge to the state court's application of Indiana's Rape Shield Statute, I.C. 35-37-4-4.[1]

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[1]The statute in question reads in relevant part, as follows:

(a) In a prosecution for a sex crime as defined in I.C. 35-42-4:
(1) Evidence of the victim's past sexual conduct;
(2) Evidence of the past sexual conduct of a witness other than the accused;
(3) Opinion evidence of the victim's past sexual conduct;
(4) Opinion evidence of the past sexual conduct of a witness other than the accused;
(5) Reputation evidence of the victim's past sexual conduct; and
(6) Reputation evidence of the past sexual conduct of a witness other than the accused;
may not be admitted, nor may reference be made to this evidence

Stephens claims that the trial court violated his constitutional right to testify and to present a defense under the fifth, sixth and fourteenth amendments to the U.S. Constitution. Stephens would have testified that Tim and Drema Hall told him that they participated in sexual partner switching in which the victim was involved and that

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in the presence of the jury, except as provided in this chapter.
(b) Notwithstanding subsection (a) evidence:

(1) Of the victim's or a witness' past sexual conduct with the defendant;
(2) Which in a specific instance of sexual activity shows that some person other than the defendant committed the act upon which the prosecution is founded; or
(3) That the victim's pregnancy at the time of the trial was not caused by the defendant;

may be introduced if the judge finds, under the procedure provided in subsection (c) of this section, that it is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

she had the reputation of liking sexual intercourse "doggy fashion". The trial court rendered the offered testimony inadmissible. Stephens asserted that the testimony excluded was evidence concerning the res gestae of the offense and not reputation evidence addressed by the statute. In addition to showing that the prosecutrix was enraged by the statements, the testimony was to establish that the alleged victim reported the attempted rape in order to provide a justification to her landlady for the police having been called to her trailer in the middle of the night. However, the trial court held that the proffered evidence was evidence of prior sexual conduct of the prosecutrix and was barred by the Indiana's Rape Shield Statute. The petitioner was allowed to testify that while engaging in sexual intercourse he said something to the

prosecutrix which caused her to be angry. Stephens argued, however, that that was not his primary purpose in offering the testimony. Since the proffered evidence was not admitted by the trial court, the petitioner alleges that he was precluded from presenting his argument to the jury with regard to how the evidence was important.

The state contends that allowing a proposed exception to the Rape Shield statute that would permit res gestae statements would make the statute a nullity and undercut its very purpose. It is the state's position that had the petitioner been permitted to testify as to his alleged statement, the State would have been placed in a position of collaterally proving there was no basis for the alleged statement, or not presenting any evidence to contradict the statement and risking the resulting

prejudice. The right to present relevant testimony is not without limitation. The right "may in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 1046 (1973). In the state's view, the procedural limitations placed on the petitioner's right to present the proffered testimony were neither arbitrary nor disproportionate to the purposes they were designed to serve. The petitioner in this case was permitted to put forward his theory of the defense. He was permitted to testify that the encounter involved a consensual act of sex, that he said something to the victim that made her angry and subsequently made her pursue the attempted rape charge.

Analysis

Every state is generally free to exercise its sovereign prerogative as to

the evidence it will admit in its courts. McMorris v. Isreal, 643 F.2d 458, 460 (7th Cir. 1981), cert. denied, 455 U.S. 967 (1982). The federal constitution, however, imposes a limited restraint upon state evidentiary rules where exculpatory evidence is excluded by arbitrary state rules. Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920 (1967). The genesis of this restriction is found in the petitioner's sixth amendment right to "compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. The Constitution imposes this limitation because the state may not deny an accused in a criminal trial the right to a fair opportunity to defend against the state's accusations. Chambers, 410 U.S. at 294, 93 S.Ct. at 1045. However, the right of a petitioner to present relevant and competent evidence is not absolute and may bow to accommodate other legitimate

interests in the criminal trial process, Hughes v. Mathews, 576 F.2d 1250, 1258 (7th Cir.), cert dismissed, 439 U.S. 801 (1978) (citing Chambers, 410 U.S. at 295, 93 S.Ct. at 1045), although the competing state interests must be substantial to overcome the claims of the petitioner. See United States v. Nixon, 418 U.S. 683, 712-13, 94 S.Ct. 3090, 3109-10 (1974). Most importantly, "where constitutional rights affecting the ascertainment of guilt are implicated, (a state evidentiary rule) may not be applied mechanistically to defeat the ends of justice." Parisic v. Greer, 671 F.2d 1011, 1019 (7th Cir. 1982) (Cudahy, J., dissenting in part).

In balancing the competing interests underlying Indiana's Rape Shield Statute and the constitutional policies favoring petitioner's right to testify, this court must first closely examine the

justification of the state interest. See Chambers, 410 U.S. at 295, 93 S.Ct at 1045. There is no doubt that Indiana has a legitimate interest in encouraging victims of sex offenses to report the crime, free of fear of being harassed or humiliated when put on the witness stand. Moore v. Duckworth, 687 F.2d 1063, 1065 n.2 (7th Cir. 1982). The principal reasons for the rape shield statutes is to shield victims of sex crimes from general inquiry into their past sexual conduct and to keep these victims from feeling that they are on trial. Thomas v. State, 471 N.E.2d 681 (Ind. 1982). The state's interest of protecting the victim was carefully balanced with the petitioner's constitutional right to testify throughout the entire proceedings. The trial judge tried to carefully and moderately apply the rape shield statute by allowing the petitioner

to testify to all events that he alleged occurred that evening. Petitioner was permitted to give a detailed account of his version of the facts and the only testimony that the jury was not allowed to hear was the specific statement revealing an alleged aspect of the prosecutrix's past sexual practices. Except for the contents of the statement he was alleged to have made, the whole thrust of petitioner's version of the facts was before the jury. This court is of the opinion that the procedural limitations placed on the petitioner's right to testify were carefully balanced by the trial judge and the petitioner's Sixth Amendment right to testify was not violated.

The Indiana statute provides that if a party purposes to offer evidence of an exception, a written motion must be filed at least ten (10) days before trial

containing an offer of proof showing the relevancy of the evidence in the case and accompanied by an affidavit in which the offer of proof is stated. The statute further provides that the court is to conduct a hearing and rule on the admissibility and form of the evidence at that time. Defendant did not follow that procedure, but attempted to offer the evidence at the time of trial. Clearly, counsel for petitioner took the trial judge by surprise by not following the provision of the rape shield statute that requires a party purposing to offer evidence of an exception, to file a pre-trial motion. This would appear to be a further basis for not admitting the specific details of the conversation when offered. The trial judge's decision to exclude the proffered testimony was carefully balanced and was rendered only after thoughtful application.

Harmless Error

Even if this court were to find that the trial judge's exclusion of the proffered testimony violated Stephens' Sixth Amendment right to compulsory process, the court would find the error to be harmless beyond a reasonable doubt and would do so for two reasons. First, it is inconceivable that the petitioner's version of the incident could have taken place. In the fifteen minutes of time between the time Stephens arrived at the prosecutrix's trailer and the time he arrived at Jeff Strait's house, Stephens alleged that he had: (1) engaged in a conversation with the prosecutrix about her pending divorce; (2) carried her small child to bed; (3) engaged in foreplay; (4) moved furniture around; (5) undressed himself and the prosecutrix; (6) engaged in sexual intercourse; (7) redressed himself and (8) left the

trailer, but did not run to the home of Jeff Strait, located several blocks away. The only testimony of the petitioner's version of the facts that was omitted was the precise substance of the conversation he alleged took place during the act of sexual intercourse. The omission of such a narrow fact would not have materially affected the jury's decision. The jury would have been hard pressed to believe this whirlwind courtship took place in a matter of fifteen minutes. It is highly unlikely that the proffered testimony would have raised a doubt about the petitioner's guilt in the minds of the jury.

Second, and probably the most damaging, was that by the time Stephens took the witness stand he had lied about what happened that evening to seven different people. He gave four different versions of the incident to his live-in

girlfriend. He convinced his best friend, David Stone, to perjure himself. He gave a false report to Office Allen Bell who was investigating the incident. It never appeared that the petitioner's credibility was ever a question for the jury. This court is persuaded that no reasonable jury would have found the proffered testimony would have raised a doubt as to the petitioner's guilt. Accordingly, the erroneous ruling was harmless beyond a reasonable doubt.

Conclusion

Accordingly, based upon the foregoing, the petitioner's Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 is hereby DENIED.

Enter: February 8, 1991.

/s/ William C. Lee
William C. Lee, Judge
United States District Court

Lonnie K. STEPHENS, Appellant,

v.

STATE of Indiana, Appellee

No. 05800-8807-CR-670

Supreme Court of Indiana

Sept. 22, 1989.

PIVARNIK, Justice.

Following a jury trial in the Blackford Circuit Court Defendant-Appellant Lonnie K. Stephens was convicted of Attempted Rape, a Class B felony, and was sentenced to a term of twenty (20) years.

Two issues are presented in this direct appeal as follows:

1. preclusion of testimony based on the Rape Shield Statute; and

2. unreasonable imposition of the maximum sentence.

The facts show that on the evening of March 17, 1987, Stephens was drinking with

his friend, Dave Stone. He asked Stone to drop him off at the victim's house trailer and Stone did so.

The victim was asleep on the couch when Stephens arrived and her sister and brother-in-law were asleep in the guest room, which was a room off the kitchen. The victim's son and nephew were asleep in a bedroom off the hallway, along which hallway the bathroom was also located. The victim awoke to find Stephens standing in front of the door inside the trailer. She had fallen asleep without locking the door. He sat on the couch beside her and made sexual suggestions. She told him others were asleep in the trailer and called out for her sister. He stopped his advances momentarily but thereafter again attempted to force his intentions on her. After going down the hall to the bathroom area, Stephens returned and, in an angry manner, accused the victim of lying about

her sister and brother-in-law being there. He then threw her on the couch and pressed his hand over her mouth to suppress a scream she was about to let out. He was on top of her, pressing his body against her, while he unfastened her bra and tore a button from her shirt. As he reached down to undo his trousers, the victim flipped him off of her and ran into the bedroom off the kitchen, shouting to wake her sister and brother-in-law. Stephens ran out the door and ran to the residence of his acquaintances, the Straits, who lived nearby.

Stephens told the Straits he had been at McHughs Pic Pac Food Store. He also told investigating Officer Allen Bell he had not been at the victim's trailer that night but had been at the Pic Pac. Stephens also told his friend Dave Stone to say if Stone was asked that he had dropped Stephens off at the Pic Pac.

Stone testified at trial that he had let Stephens off at the Pic Pac but on cross-examination admitted he actually had let Stephens off at the victim's trailer and had previously said the Pic Pac because Stephens told him to say so.

At trial, Stephens asserted the defense of consent of the victim, claiming they had engaged in consensual sexual intercourse. He claimed the position used by them was vaginal intercourse by rear entry which he referred to as "doggy style." He claimed that while they were so engaged, he told her he had heard she enjoyed rear entry style intercourse and this made her so angry she pursued the attempted rape charges against him.

I

Stephens claims the trial court erred in excluding his proposed testimony regarding the victim's past sexual conduct and reputation. In an offer to prove

during trial, Stephens would have testified that Tim and Drema Hall told Stephens they had participated in sexual partner switching in which the victim was involved and that she had the reputation of liking sexual intercourse "doggy fashion." Stephens claims that while he was having intercourse with her in that fashion, he told her this story and she became so angry she made him stop and leave. He claimed her anger caused her to bring this criminal action against him.

Stephens now contends an exception to the Rape Shield Statute should be carved out to include res gestae statement. The statute referred to as the Rape Shield Statute, Ind. Code § 35-37-4-4, provides for three exceptions to the exclusion of reputation evidence of the past sexual conduct of a witness other than the accused. Those exceptions are: the victim's or witness' past sexual conduct

with the defendant; evidence that shows a specific instance of sexual activity which would show some person other than the defendant committed the act in question; and evidence that the victim's pregnancy at the time of trial was not caused by the defendant. The statute further provides in § 35-37-4-4(c) that if a party proposes to offer evidence of an exception, a written motion must be filed at least ten (10) days before trial containing an offer of proof showing relevancy of the evidence in the case and accompanied by an affidavit in which the offer of proof is stated. Section (c) further provides that the court is to conduct a hearing and rule on the admissibility and form of the evidence at that time. Appellant did not follow that procedure at the time of trial. His contention that a proposed exception permitting res gestae statements is suspect because he claims it is his own

statement that he made during the encounter and is denied by the victim. Obviously approval of such an exception would open the door for evading the statute entirely.

The purpose of the Rape Shield Statute is to shield the victims of sex crimes from general inquiry into their prior sexual conduct. Lewis v. State (1982), Ind., 440 N.E.2d 1125, 1129, cert. denied (1983), 461 U.S. 915, 103 S.Ct. 1895, 77 L.Ed.2d 284. If it appears to the court there may be a reason to admit evidence of the victim's past sexual conduct, the court's ultimate determination is reversible only upon abuse of discretion. Munn v. State (1987), Ind., 505 N.E.2d 782, 785. Stephens was permitted to testify that he had a friendly relationship with the victim, that they were engaging in consensual sexual intercourse on that

night, and that she became angry with him and forced him to stop. Considering the facts and circumstances here, we are unable to find an abuse of discretion in the trial court's ruling.

Stephens further contends violation of due process of law in the imposition of the Rape Shield Statute preventing him from testifying. He cites Chambers v. Mississippi (1973), 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297. Chambers concerned a murder trial wherein Chambers was not allowed to cross-examine one McDonald, who had confessed to the murder and whom Chambers had called as a witness, because Mississippi's common law "voucher" rule prohibited one from impeaching his own witness. Under the Mississippi rule, Chambers was not allowed to introduce the testimony of three witnesses to whom McDonald had confessed to the murder as the trial court had held that inadmissible

hearsay. The Chambers Court held that the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interest in the criminal trial process. The Court further observed, however, "[t]he [voucher] rule rests on the presumption-without regard to the circumstances of the particular case-that a party who calls a witness 'vouches for his credibility.'" Such a rule "bears little present relationship to the realities of the criminal process." Id. at 295-96, 93 S.Ct. at 1046, 35 L.Ed.2d at 309. Appellant claims in the instant case that the refusal to permit his proposed testimony represented a similar mechanistic application of rules and prevented him from presenting relevant and probative evidence resulting in deprivation of due process of law.

We fail to see a parallel in the

facts and circumstances of Chambers and the instant case. The purpose of the Rape Shield Statute was to prevent evidence such as that proposed by Stephens. Stephens' proposed testimony was not only evidence of the victim's past sexual conduct but was based solely on his own statement and credibility supported by hearsay. It was also demonstrated by the evidence that Stephens gave several conflicting versions of the incident. Stephens fails to show a deprivation of due process of law.

II

Finally, Stephens claims the imposition of the maximum sentence of twenty (20) years for a Class B felony was manifestly unreasonable in light of the nature of the offense and the character of the offender pursuant to Rule 2 of Ind. R.App.Rev.Sen.

Stephens bases this contention on the

fact that the evidence showed there was no actual completion of the act of rape, that relatively little resistance was required from the victim to ward off the attack, and that according to the victim's testimony the closest Stephens ever came to actually completing the act was to start to unfasten his trousers. His reasoning is that to give the maximum sentence in a case with these facts is to violate a rational sentencing scheme that should punish more severely those who commit more heinous acts. Fointno v. State (1986), Ind., 487 N.E.2d 140, 148. Our standard of review of this issue has been clearly stated. We find a sentence to be manifestly unreasonable if no reasonable person could find the sentence appropriate to the offender. Crisler v. State (1987), Ind., 509 N.E.2d 822, 823. The trial court is given wide discretion in fixing the sentence upon conviction and

will be reversed only if a manifest abuse of discretion is demonstrated. Harris v. State (1981), Ind., 425 N.E.2d 112, 117. We do not conduct a de novo review of the sentencing hearing and assess or reweigh the trial court's findings and conclusions regarding aggravating and mitigating circumstances so long as the sentences imposed were authorized by statute and the record discloses support for the trial court's finding of aggravating and mitigating circumstances. Bish v. State (1981), Ind., 421 N.E.2d 608, 620.

To comply with Ind. Code § 35-38-1-3, the trial court's statement of the reasons for the sentence imposed must identify all the significant mitigating and aggravating circumstances, state the specific reason why each circumstance is considered to be mitigating or aggravating, and articulate that the court evaluated and balanced the mitigating circumstances against the

aggravating circumstances to determine if the mitigating circumstances offset the aggravating circumstances. Townsend v. State (1986), Ind., 498 N.E.2d 1198, 1201; Hammons v. State (1986), Ind., 493 N.E.2d 1250, 1254.

In the instant case, the trial court found as aggravators that, as a juvenile in 1973 and in 1975, Stephens was found to be a delinquent for having committed the offenses of burglary; since having become an adult, Stephens had been convicted of disorderly conduct, conversion, criminal trespass, and battery, all misdemeanors; Stephens had previously been found guilty of the misdemeanor of battery which involved an aggressive and violent act; that in this cause of action, Stephens was convicted of attempted rape, an act of aggression; and that during the police investigation Stephens lied to police authorities in making statements on

several occasions, said false statements being admitted to by Stephens at trial. The court found the only mitigator was the fact that Stephens provided support for his three minor children. He found the aggravating circumstances, particularly including Stephens' past criminal record and his potential for aggressive behavior, greatly outweighed the mitigating circumstances in this action. He concluded Stephens should been sentenced to the enhanced term of twenty (20) years. We find no abuse of discretion in the trial court's determination of sentence here nor do we view the sentence as being manifestly unreasonable.

The trial court is affirmed.

SHEPARD, C.J., and GIVAN, J., concur.

DeBRULER, J., dissents with separate opinion in which DICKSON, J., concurs.

DeBRULER, Justice, dissenting.

The defense to this attempted rape

charge was consent. Appellant testified that he and the victim were engaged in consensual sexual intercourse when the putative victim became angry at him and disengaged. According to the defense story, such anger was caused by something appellant said at the time; and the anger was so great that it caused the putative victim to bring a false charge of rape. Because the telling would constitute evidence of the victim's past sexual conduct, the exclusionary rule of the rape shield statute was applied so as to bar appellant from telling the jury what it was that he had said to her. I.C. 35-37-4(a)(1).

This situation is parallel to that in which a trial court is called upon to bar the production of evidence that would put the defendant in a place other than the place of the offense at the critical time. I.C. 35-36-4-1. A majority of this Court

has held that where the defendant has failed to comply with the provisions of the alibi statute, the exclusionary rule of that statute may constitutionally be applied so as to prevent the defendant himself from testifying that he was at another place at the time of the crime. Lake v. State (1971), 257 Ind. 264, 274 N.E.2d 249. Two judges of this Court have held the position that the exclusionary rule may be applied so as to prevent the defendant from presenting witnesses and documentation for an alibi, but that it may not be applied so as to prevent the defendant himself from personally testifying and giving his exculpatory stories. Bowen v. State (1975), 263 Ind. 558, 567, 334 N.E.2d 691, 697 (concurring opinion of DeBruler, J., in which Prentice J., concurred). The basis of this differing view is that the right of the accused to be heard in the tribunal is

among the most sacrosanct and most essential to a fair determination of guilt. We were of the opinion that the right to be heard could not be forfeited in furtherance of a statute, the purpose of which was to protect the state from facing surprise defenses.

The situation here is quite similar. The purpose of the rape shield statute is a good and legitimate one. However, the defendant has the right to be heard in court and to give his version of the events upon which the state relies for conviction. Such right is, I believe, paramount in this situation, and the interest served by the rape shield statute must give way so as to permit the defendant to speak his piece under oath in front of the trier of fact with regard to the events transpiring at the time of the offense which serve the interests of the defense in any rational way. This

proposed testimony of the defendant himself satisfies this test of rationality, even though it may be suspect and open the door to evasion of the statute as declared in the majority opinion.

I would hold that the trial court was in error when ruling that appellant could not testify and describe what he told the alleged victim at the time the offense was alleged to have been committed.

DICKSON, J., concurs.